TRANSCRIPT OF RECORD

United States Court Of Appeals

TENTH CIRCUIT

VOL. I

No. 5579

MINNIE FRANKLIN, Appellant,

vs.

J. D. SHELTON and wife, VENERA SHELTON, suing herein in their own behalf; and PAMELA SHELTON, LARRY SHELTON, ANITA SHELTON, and ROBERT SHELTON, minors, suing herein by and through J. D. SHELTON, as their next friend, Appellees.

Appeal from the United States District Court
for the Eastern District of Oklahoma

Filed February 23, 1957.
Supplemental record filed March 13, 1957.

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No. 5579

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IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

No. 5579

MINNIE FRANKLIN, Appellant,

vs.

J. D. SHELTON et al., Appellees.

Appellant's Statement Of Points Relied On

Comes now the appellant and shows to this Court that she relies upon the following points in the presentation of her appeal herein:

1. The Court erred in overruling the motion of the appellant to strike parties plaintiff on account of a misjoinder thereof as reflected by the motion on file herein.

2. The court erred in sustaining the motion of the appellees and striking from the answer and cross-complaint of the appellant the allegations set out therein with reference to the joint ownership of the automobile and the common custom and usage of the highway at the point involved in the accident, all as more fully appears from the motion on file herein.

3. The court erred in the admission of incompetent, irrelevant and prejudicial evidence on the part of the appellees.

4. The court erred in the rejection of competent evidence offered in the trial by the appellant.

5. The court erred in the instructions to the jury, to which the appellant excepted.

6. The court failed and refused to present to the jury

the appellants theory of the case.

7. The court erred in refusing to declare a mistrial on account of the misconduct of the appellees J. D. Shelton and his wife Venera Shelton in the presence of the jury.

8. The court erred in refusing to give the requested instructions numbered 1 to 24 offered in writing by the appellant and as shown by the record herein.

9. The court erred in refusing to require appellees counsel to fully present in the opening argument their case to the jury and in permitting counsel to use only five minutes of the argument in the opening and in refusing to discuss the whole case, all as more fully appears from the record herein, after due request by appellant's counsel.

10. The court erred in not declaring a mistrial after the jury had deliberated more than four hours and having declared to the court that the jury had not arrived at any of the points or claims of the case.

11. The court erred in permitting the jury to separate during the night and return at 10:00 o'clock A.M. the following day under the conditions as reflected by the record.

12. The verdict was arrived at on account of passion, prejudice and sympathy.

13. The verdict is not support by the evidence.

14. The verdict is not supported by the law.

15. The verdict is excessive.

16. The court erred in overruling the motion of the appellant for a new trial.

Dated this the 15th day of March, 1957.

Minnie Franklin, Appellant
By Her Attorneys,
John B. Ogden
Josh Lee
R. A. Howard
By John B. Ogden

Filed Jan. 18, 1957.

Franklin v. Shelton et al.

Appellant's Supplemental Statement
Of Points Relied On

Comes now the appellant and shows to the Court that she relies upon the following points in addition to the points set forth in her original statement of points relied on herein:

1. The trial court erred in overruling the motion of the appellant for an instructed verdict at the close of the evidence offered by the appellees and after appellees rested their case as reflected by the record.

2. The court erred in overruling the motion of the appellant for an instructed verdict as to the appellees named therein, which motion was presented at the close of all the evidence.

Minnie Franklin, Appellant,
By Her Attorneys,
John B. Ogden
Josh Lee
R. A. Howard
By John B. Ogden

Filed Jan. 18, 1957.

Franklin v. Shelton et al.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF OKLAHOMA

Pleas and Proceedings before The Honorable W. R. Wallace, Judge of the United States District Court for the Eastern District of Oklahoma, presiding in the following entitled cause:

J. D. SHELTON and wife, VENERA SHELTON, suing herein in their own behalf, and PAMELA SHELTON, LARRY SHELTON, ANITA SHELTON, and ROBERT SHELTON, minors, suing herein by and through J. D. SHELTON, as their next friend, Plaintiffs,

vs.

MINNIE FRANKLIN, Defendant.

No. 3980, Civil.

1] Complaint

To The Honorable Judge of Said Court:

Comes now J. D. Shelton and wife, Venera Shelton, suing herein in their own behalf, and Pamela Shelton, Larry Shelton, Anita Shelton, and Robert Shelton, minors, suing herein by and through J. D. Shelton, as their next friend, plaintiffs, complaining of Minnie Franklin, defendant, and would respectfully show the Court the following:

I. Plaintiffs J. D. Shelton and Venera Shelton are husband and wife, and are the father and mother of each of the minor plaintiffs herein, all of whom are residents of Hopkins County, Texas.

Defendant Minnie Franklin, a widow, who resides at 1101 Fourth Avenue S. W., in the City of Ardmore, County of Carter, Oklahoma.

Franklin v. Shelton et al.

Jurisdiction is based upon diversity of citizenship and the amount of controversy, exclusive of interest and costs, exceeds the sum of $3,000.00.

II. At the times herein mentioned, defendant Minnie Franklin was the owner and operator of a 1953 Cadillac automobile, accompanied by her grandchild, and a Negro servant or helper.

2] At all times herein referred to, J. D. Shelton was the owner and operator of a 1952 model Nash station-wagon, accompanied by his wife and their four children, the other plaintiffs herein.

III. On the 3rd day of July, A. D. 1955, at approximately 1:45 o'clock P.M., said Nash station-wagon was being driven and operated by plaintiff J. D. Shelton, in a careful, prudent and lawful manner, at the rate of speed not in excess of forty-five (45) miles per hour, in a northerly direction along the east lane of the two-lane U. S. Highway No. 77, in Carter County, Oklahoma, about one-half mile south of the city limits of Ardmore in front of the "Chicken in the Rough" Restaurant; at which time defendant's Cadillac automobile, operated by defendant in a wreckless and careless manner and without warning, came from the west side or lane of the highway across said highway in an easterly direction toward the restaurant, directly in the path of plaintiff's station-wagon, causing plaintiff's station-wagon to crash into the defendant's Cadillac automobile on plaintiff's right hand side of said highway, causing serious and permanent personal injuries to each and all of the plaintiffs herein, and almost completely demolished the station-wagon of plaintiff, as will be hereinafter more fully shown.

IV. The acts of negligence of defendant immediately preceding said collision were the sole and proximate cause of said collision, which acts of negligence are as follows:

(1) Defendant failed to keep a proper look-out for plaintiff's automobile;

(2) Defendant failed to keep a proper look-out for traffic ahead on said highway at said time and place;

(3) Defendant operated her Cadillac automobile at a rate of speed which was dangerous and excessive under the circumstances then existing as above set forth;

3] (4) Defendant was guilty of negligence as a matter of law in that she failed to yield the right of way to the plaintiff's station-wagon;

(5) Defendant was guilty of negligence as a matter of law in that she drove her Cadillac automobile across said highway in the path of plaintiff's approaching station-wagon.

That each and all of the acts of negligence above alleged were the direct and proximate cause and causes of the injuries and damages sustained by plaintiffs as hereinafter alleged.

V. As a direct and proximate result of the negligence of the defendant as set forth above, when the station-wagon and Cadillac automobile collided, plaintiff J. D. Shelton was thrown against the steering wheel and windshield and together with plaintiff Larry Shelton, the two were thrown out of the station-wagon; plaintiff Venera Shelton was thrown against the windshield and inside dashboard of the station-wagon and pinned in the station-wagon; plaintiffs Robert Shelton, Pamela Shelton and Anita Shelton were thrown about and against hard objects on the inside of the station-wagon, rendering all of the plaintiffs unconscious.

They were immediately transported to the Memorial Hospital in Ardmore, Oklahoma, where they were rendered emergency treatment by Drs. Lloyd L. Long, Jr., and Thornton Kell of that City. They were then transported by airplane to Baylor Hospital in Dallas, Texas where they were hospitalized and have been under the care and treatment of Drs. Glenn Cherry, Milton V. Davis and George T. James.

VI. Plaintiff John D. Shelton, sustained severe and permanent injuries consisting of cerebral concussions of the body and lacerations and concussions of the body and in particular multiple cerebral concussions, abrasions and lacerations of the head, and resulting pressure on the brain; his left arm was broken, and his left shoulder pulled and twisted; his right arm and wrist in particular was bruised,

twisted and pulled, resulting in severe injuries to his right arm, neck and shoulder; he sustained extensive injuries to the ligaments, tendons, nerves, and muscles in his back, and the vertebra in his back were torn, bruised and twisted, and resulted in one or more ruptured intervertebral discs; he has consequently suffered great and excruciating pain in his head, shoulders, arms, back, and spine; the pain and suffering is so severe that he is unable to rest, and he suffers from loss of sleep and appetite; the pain in his head, back and other portions of his body is constant and is gradually tearing down and wearing away his nerves and nervous system. That all of the injuries suffered by this plaintiff were and are serious and permanent.

4] That the doctor, medical and hospital bills incurred by this plaintiff as a result of the collision and the charges therefor to date hereof total the sum of $510.00, and are reasonable charges therefor, and in the future this plaintiff will be compelled to expend an additional sum for medical, doctors and hospital treatment of approximately $10,000.00, all of which are reasonable and necessary.

Plaintiff J. D. Shelton is forty-two (42) years of age and has a life expectancy of twenty-six (26) more years to live according to the American Experience Table of Mortality rates; that he was in good health prior to the injuries as above alleged, but now he is permanently and totally deprived of earning a living; that at the time he sustained his injuries, he was gainfully employed as a barber, was making $8,000.00 per year in such occupation, but now he is deprived by virtue of his injuries to further pursue his chosen profession as well as any other gainful occupation requiring physical labor in the usual tasks of a workman.

5] VII. Plaintiff Venera Shelton sustained serious and permanent injuries consisting of abrasions and lacerations of her face and left eye and left side of her nose; she also sustained cerebral concussions about her head; she sustained fractures and lacerations of both of her knees, and lacerations and abrasions of her left shoulder and a severe injury to her left foot and ankle; she also sustained concussions and abrasions of her chest and right shoulder and ribs; also extensive injuries resulted to the ligaments, nerves and muscles in her back and the vertebra in her back

were torn, twisted and bruised; she has consequently suffered great and continuous pain throughout her body, and extreme soreness in her right side and back, and her spine is a source of constant pain and suffering to her; the pain about her body is constant and is gradually tearing down and wearing away her nerves and nervous system. All of the injuries suffered by this plaintiff were and are serious and permanent.

The doctors, medical and hospital bills incurred by this plaintiff as a result of the collision and the charges therefor total the approximate sum of $429.00, and are reasonable charges therefor, and in the future this plaintiff will be compelled to expend an additional sum for medical, doctors and hospital treatment of approximately $3,000.00 which is reasonable and necessary.

Plaintiff Venera Shelton is thirty-nine (39) years of age and has a life expectancy of twenty-eight (28) more years to live according to the American Experience Table of Mortality Rate. She was in good health prior to the injuries above alleged; at the time she sustained her injuries, she was able to and was performing her duties and responsibilities as a housewife and mother for her four minor children, but now she is deprived by virtue of her injuries to further pursue her duties as housewife and as well is unable to do any type of occupation requiring physical labor.

6] VIII. Plaintiff Larry Shelton was in deep shock following the sustaining of his injuries; he sustained multiple skull fractures, and suffered a severe cerebral concussion, resulting in pressure on his brain; he received severe lacerations about the left side of his head. He has undergone surgery at Baylor Hospital to relieve the pressure on his brain as a result of the accident. The injuries about his head has affected his mental competency, and all of his injuries were and are serious and permanent.

The doctors, medical and hospital bills incurred by this plaintiff as a result of the collision and the charges therefore are in the total sum of $500.00, and are reasonable charges therefor, and in the future this plaintiff will be compelled to expend an additional amount for medical, doctors and hospital treatment, approximately $10,000.00

which is reasonable and necessary.

Larry Shelton is eight (8) years of age and has a life expectancy of forty-nine (49) more years to live according to the American Experience Table of Mortality Rate. He was a robust, growing boy when the collision occurred with no physical or mental deficiencies or handicaps, and was in good health; he was studious, industrious, ambitious and diligent in his studies, and a faithful child to his parents.

IX. Plaintiff Robert Shelton, was riding in the front seat of the station-wagon with his parents and was thrown into the windshield and inside dashboard of the car, and he sustained severe concussions and abrasions in his chest and his left lung collapsed; surgery was performed and tubes placed in his body in an effort to expand the lung. He sustained skull fractures, abrasions and lacerations about the head, and lacerations on his left ear. He has had severe pain about his body since the injuries and he also suffered from severe shock; he is extremely nervous, and all of his injuries were and are serious and permanent.

7] The doctors, medical and hospital bills incurred by this plaintiff as a result of the collision and charges therefore are in the total sum of $380.00, and in the future he will be compelled to expend an additional sum of $2500.00 for medical, doctors and hospital treatment, which is reasonable and necessary.

Plaintiff Robert Shelton is two (2) years of age and has a life expectancy of fifty-four (54) more years to live according to the American Experience Table of Mortality Rate. He was in good health and a growing boy when the accident occurred, with no physical or mental deficiencies or handicaps.

X. Plaintiff Pamela Shelton sustained deep shock, and a concussion and abrasions of the head and abrasions on her right arm and side; she sustained severe shock to her entire nerves and nervous system; she has been in great pain since the accidental injuries, and has been unable to sleep and rest properly. And by reason of said injuries her doctor, medical and hospital bills incurred as a result of the collision are of the total sum of $100.00, and in the future

this plaintiff will be compelled to expend an additional sum of $500.00 for medical, doctors and hospital treatment, which is reasonable and necessary.

Plaintiff Pamela Shelton is nine (9) years of age and has a life expectancy of forty-eight (48) more years to live according to the American Experience Table of Mortality Rate. She was in good health prior to the injuries sustained and was studious, industrious and diligent in her studies, and faithful to her parents.

XI. Plaintiff Anita Shelton received abrasions about the face and a fracture of her nose, and has suffered with severe headaches and pain and discomfort about the upper portion of her body; she sustained severe nerve shock. The doctor, medical and hospital bills incurred by this plaintiff as a result of the collision total approximately
8] $100.00, and in the future she will be compelled to expend an additional sum of $500.00 for medical, doctors and hospital treatment, which is a reasonable estimate and necessary expense.

Anita Shelton is seven (7) years of age and has a life expectancy of fifty (50) more years to live according to the American Experience Table of Mortality Rate. Prior to the injuries above alleged, she was in good health and was a strong and vigorous child, and dutiful to her parents.

XII. As a result of the collision which resulted in the injuries sustained by plaintiffs Pamela, Larry, Anita and Robert Shelton it was necessary for plaintiff J. D. Shelton to make provisions for medical and hospital care for said minors and he did in truth and in fact contract to see that proper medical and hospital care was given said minors; said plaintiff J. D. Shelton has obligated himself to pay the sum of $1,080.00, representing medical and hospital care for the four minors, plaintiffs, which amount is reasonable, customary and necessary to be expended in their behalf as alleged in detail hereinabove, and therefore plaintiff J. D. Shelton is entitled to recover from and of the defendant said sum.

XIII. Plaintiff J. D. Shelton further alleges that immediately prior to the collision in question, his Nash

station-wagon had a reasonable cash market value in Ardmore, Carter County, Oklahoma of $700.00; immediately after the collision in question, said Nash station-wagon, by virtue of the actions of the defendant above alleged, had a reasonable cash market value in Ardmore, Carter County, Oklahoma of the sum of $100.00, resulting in plaintiff's damage in the amount of $600.00.

XIV. By virtue of the damages and injuries sustained as a result of the negligence of the defendant as above alleged, plaintiffs have been damaged and are entitled
9] to recover from the defendant in the following amounts:

Plaintiff J. D. Shelton,	$112,190.00
Plaintiff Venera Shelton,	$ 31,429.00
Plaintiff Larry Shelton,	$ 53,500.00
Plaintiff Robert Shelton,	$ 10,380.00
Plaintiff Pamela Shelton,	$ 5,000.00
Plaintiff Anita Shelton,	$ 5,000.00

Wherefore, plaintiffs pray that defendant be cited to appear and answer herein for the time and in the manner required by law, and that these plaintiffs have judgment against the defendant as follows: J. D. Shelton, $112,190.00; Venera Shelton, $31,429.00; Larry Shelton, $53,500.00; Robert Shelton, $10,380.00; Pamela Shelton, $5,000.00; Anita Shelton, $5,000.00; and that these plaintiffs have judgment for such other and further relief to which they may show themselves justly entitled to receive, including all costs of court herein, and all of which these plaintiffs will ever pray.

Howard S. Smith
Attorney for Plaintiffs.

Filed July 25, 1955.

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10] Motion To Strike Parties Plaintiff
and
Motion For More Definite Statement

Motion To Strike Parties Plaintiff

Comes now the defendant and shows to this Honorable Court that all of the parties plaintiff herein are not proper parties plaintiff and that the questions of law and fact will not be common to all of them as provided for in Rule 20 of Rules of Civil Procedure and all of said parties do not assert right to relief jointly, and that it would be prejudicial to the rights of the defendant to permit all of said parties to proceed in the same action as plaintiffs against this defendant, and that this Court under Rule 21, Rules of Civil Procedure should make an Order dropping from the parties plaintiff all of the parties except the husband and wife or the claims of the plaintiff should be severed and proceeded with separately.

Wherefore, the defendant moves the Court to make an Order in accordance with the above motion or to make such Order with reference to the trial of the various claims of the various plaintiffs as would be just under the circumstances therein shown.

R. A. Howard and
John B. Ogden
Attorneys for Defendant
By John B. Ogden

11] Motion For A More Definite Statement

Comes now the defendant and moves the Court to require the plaintiffs to amend their complaint by giving a more definite statement in the following particulars:

1. By setting forth in sub-paragraph (3) of paragraph 4 the speed which the plaintiff alleges the defendant was driving said Cadillac automobile and which the plaintiff alleges to be dangerous and excessive.

2. That the plaintiff set out more in detail a description of the injuries sustained and plead in paragraph

6 of the complaint and describe the injuries or number thereof or location thereof, and to set out the name or number of the intervertebral disc and whether one or more than one was ruptured and to attach or furnish an itemized statement of the medical charges which the plaintiff alleges to be $510.00, and to allege whether or not the $10,000.00 which is sued for in said paragraph for the use and benefit of the plaintiff J. D. Shelton for future medical treatment is an estimate on the part of the plaintiff or upon the part of a doctor and upon what the same is based, and if by a medical doctor, a written statement thereto.

3. This defendant, without detailing in this motion the request as to each of the plaintiffs, makes the same request as to the allegations in paragraph 6 with reference to the injuries of Venera Shelton, the medical bills and the future medical testimony, and this defendant requests the plaintiff to furnish a more definite statement with reference to the injuries of Larry Shelton, and to describe the same and to itemize the medical bills claimed to have been expended and the $10,000.00 medical bills to be expended in the future, or to state upon what the same is based, all as set out in paragraph 8 of the complaint.

12] 4. This defendant further requests a more definite statement as to the injuries of Robert Shelton, plaintiff herein, mentioned and set out in paragraph 9 of the complaint, and asks the Court to require the plaintiff to detail the injuries and furnish a medical statement or an itemized statement of the medical charges, and to set out upon what the plaintiff bases the future medical charges of $2,500.00, and to show the same with reference to the plaintiff, Pamela Shelton, alleged in paragraph 10, and as to plaintiff, Anita Shelton, alleged in paragraph 11.

R. A. Howard and
John B. Ogden
Attorneys for Defendant.
By John B. Ogden

Filed Aug. 12, 1955.

Franklin v. Shelton et al.

13] Reply To Defendant's Motion To Strike Parties Plaintiff

To The Honorable Judge Of Said Court:

Comes now the plaintiffs and respectfully show to the Court that all are proper parties plaintiff herein. This cause of action grew out of an automobile collision wherein all of the parties plaintiff were riding in the same vehicle at the time of the incident; the facts of the collision and the negligence of the defendant are common to all the parties plaintiff.

It would appear that Rule 20 of the Federal Rules of Civil Procedure is particularly applicable to the facts which we have in this particular case, and therefore permits the joinder of parties plaintiff as we have done here. It would further appear that under this Rule, all parties plaintiff in this action are permitted to join together even though their damages are sought separately.

We believe this Rule permits joinder of several parties plaintiff for the express purpose of preventing a multiplicity of suits, which would of necessity result if defendant's motion is granted.

14] Wherefore, plaintiffs pray the Court to refuse defendant's Motion to Strike Parties Plaintiff.

Howard S. Smith
Attorney for Plaintiffs.

Filed Aug. 26, 1955.

15] Order Overruling Motions of Defendant to Strike Parties Plaintiff and For a More Definate Statement

Now on this the 13th day of December, 1955, there coming on for hearing before the undersigned District Judge the Motions of Defendant to Strike Parties Plaintiff and For More Definate Statement and the same being heard at Oklahoma City by agreement of counsel. Argument of

counsel for defendant being heard and considered, said motions and each of them are overuled.

Defendant given 15 days from this date in which to answer.

W. R. Wallace
U. S. District Judge

Filed Jan. 6, 1956.

16] Answer And Cross-Complaint

Comes now the defendant and for her answer to the complaint filed herein by the plaintiffs and denies generally and specifically each, every and all the allegations contained in said complaint save and except such as are hereinafter specifically admitted.

The defendant has no information with reference to the allegations in paragraph 1 of the complaint with reference to the relationship of the various plaintiffs and therefore neither denies or admits such allegations, but the defendant admits that she is a widow and a resident of Ardmore, Carter County, Oklahoma.

The defendant admits the first sentence of paragraph 2 and as to the second portion of said paragraph, this defendant has no information and therefore neither admits or denies said allegation.

The defendant denies the allegations of negligence and the allegations in general of paragraph 3 in said complaint.

The defendant specifically denies the allegations of paragraph 4 of said complaint.

The defendant denies the allegations of paragraph 5 of said complaint insofar as the allegations concerning or alleging negligence on the part of the defendant is concerned, and as to the other matters therein alleged, this defendant neither admits or denies the same for the reason that she has no knowledge with reference thereto.

With reference to paragraph 6 of said complaint, this defendant shows to this Honorable Court that she does not have information with reference thereto and therefore neither admits or denies the same.

17] This defendant shows to this Honorable Court with reference to paragraph 7 of the complaint, that she has no information with reference thereto and neither admits or denies said allegations.

This defendant shows to this Honorable Court with reference to paragraph 8 of the complaint that she has no information with reference thereto and neither admits or denies said allegations.

This defendant shows to this Honorable Court with reference to paragraph 9 of the complaint, that she has no information with reference thereto and neither admits or denies said allegations.

This defendant shows to this Honorable Court with reference to paragraph 10 of the complaint, that she has no information with reference thereto and neither admits or denies said allegations.

This defendant shows to this Honorable Court with reference to paragraph 11 of the complaint, that she has no information with reference thereto and neither admits or denies said allegations.

This defendant shows to this Court with reference to paragraph 12 of the complaint, that she has no information with reference thereto and neither admits or denies said allegations.

This defendant shows to this Honorable Court with reference to paragraph 13 of the complaint, that she has no information with reference thereto and neither admits or denies said allegations.

This defendant specifically denies the allegations contained in paragraph 14 of said complaint.

This defendant now shows to this Honorable Court that

on or about the 3rd day of July, 1955, she was operating an automobile and driving south on U. S. Highway 77 at or near the outskirts or city limits of the City of Ardmore, Oklahoma, and that at such point there was and is a business or residential and business section along said highway and that for a great distance, the exact number of miles south on said highway being at this time unknown to this defendant, there are numerous buildings including a community sales barnwhere large groups of people assemble, and adjoining said highway and on the east side thereof, and still
18] south, is a public golf course where the people or residents of Ardmore assemble for the purpose of engaging in playing golf, and in addition thereto, there are motels along and on the east side of said highway and south of and north of the place on said highway where the accident mentioned in the complaint occurred, and that there are, immediately to the south of said place, filling stations, residences and public establishments, and immediately to the north and adjoining thereto, there are other establishments conducted for business, and there are also residences located in said section near to and adjoining said highway, and that the highway at said point and for a long distance both north and south from where said accident occurred is widened and enlarged and provisions made for the turning of vehicles, parking of the same on both sides of said highway, and there is to the east of said highway, that is the paved portion of said highway, a wide open space more than 60 feet wide and without obstructions and graveled and level with said paved portion of said highway so that the same is used and may be used for such traffic and cars driving north on said highway, in addition to the paved portion of said highway, a large, smooth, level and graveled portion to the east of said highway, and to the west of said highway approximately 60 feet, and that said area wherein the accident complained of occurred and adjoining thereto is a residential district and business district, and that cars are continually driving across said highway from the west to the east and from the east to the west on account of the fact that such business establishments exist, and it has become the common practice, common usage and common custom to use said area as a business area, and that the same is used by the people of Ardmore generally as a business area and by other persons who travel said highway.

This defendant now shows that for approximately a mile

south of the point where the accident is alleged to have occurred, there are buildings of various kinds used for various and sundry businesses as hereinabove set out and a person travelling on said highway from the south to
19] the north by virtue thereof, knows or should know that he is approaching densely populated and busy business section and that cars are likely to be crossing said highway from either direction on account of such business buildings and business establishments and residential buildings abutting and adjoining said highway.

This defendant further shows to this Honorable Court that there is located at or near said point more than one restaurant or cafe and it has become the custom and was at all times mentioned in the complaint filed herein and at all times mentioned in this answer, for the citizens and residents of Ardmore to drive out to said business section and use said highway 77 and to use said area as a place for turning, and that the Highway Department of the State of Oklahoma in recognition thereof has graveled both sides of said highway and made the same level and even with the paved portion of said highway in order to accommodate the public in driving to said business establishments and providing a turn-around on said highway in said business section or said section hereinabove referred to, and that by virtue of such custom being brought about by the nature of the use of said area, said residents, including this defendant, use said area when travelling to or from said business section or area hereinabove referred to.

That on both the east and west side of the concrete portion of said road, the Highway Department of the State of Oklahoma has caused to be joined on to said paved portion or concrete portion of said highway, asphalt or concrete paving extending out from the concrete portion of said highway on either side thereof on account of the use being made thereof by the customers of the businesses hereinabove described and the use to which said highway and said portion thereof is used, and then extending out from said asphalted or paved abuttment on either side, the said Highway Department leveled and graveled all of said area on both sides and the same is level and no bar-ditches or excavations of any kind are on said highway for the reasons hereinabove set out, and there is ample room on either side of said

20] highway off of the paved portion thereof for cars to travel freely without interference or obstructions.

That to the south of said point alleged in the complaint herein, a distance of 300 or 400 feet, the exact distance at this time not being known to the defendant, but will be shown by proper measurements in the trial of this cause, there is a hill or rise.

This defendant shows that under the circumstances, considering the nature and the use of said highway and considering the condition of said highway as hereinabove described, a driver of an automobile, and especially the plaintiff, should have approached coming from the south, said business district or said area wherein said accident is alleged to have happened, in a cautious, careful and prudent manner and should have slowed his car not to exceed 20 miles per hour or less on account of approaching said area under the conditions as they then existed and as they now exist.

This defendant shows that on the date alleged, she was driving her automobile from her home in Ardmore south on Highway 77 and had in the car with her her grandchild of tender years and also another child to assist her in caring for said grandchild, and that she was going to said section hereinabove referred to for the purpose of eating lunch or dinner at a cafe on the east side of said highway and opposite or near the point where the accident complained of happened.

This defendant now shows that when she approached said point on said highway, she drove her car to the right or to the west side of the concrete portion of said highway in order to permit traffic to clear before crossing over to the east side of said highway where said cafe was located, said cafe being located on the east side and back from said highway some 60 or 70 feet, the exact distance being at this time unknown to the defendant but will be shown in detail on the trial of this cause, and that she stopped her car off of the concrete portion of said highway and looked both directions as a matter of precaution after stopping said automobile, and that when the traffic had cleared and no car was approaching in close proximity to her car and no car was in site approaching from the south, she started her car from a

dead stop across said highway at said point in a careful and prudent manner and at a reasonable rate of speed, and that the plaintiff in this cause drove his car from the south and over said hill and carelessly and negligently drove his car into and against the car of this defendant after she had driven her car across said highway and a portion of her car or the major portion of her car was off of said highway to the east and on the graveled part of said highway and off of the paved part of said highway, striking her car on the right side with great force and thereby bringing about the collision herein complained of.

21] This defendant shows to this Honorable Court that her car was demolished, shoved and pushed by the force and impact of the plaintiff's car, and that said collision took place at the east edge of said paved portion or concreted portion of said highway, and that part of her car, the front part, and probably more than one-half of her car was extending out on the gravel to the east of said highway at the time of the collision. That at the time of the collision there was ample space some 60 or 70 feet to the east of the defendant's car which was free, open and unobstructed, level and graveled and a driving surface on which the plaintiff could have driven his car without injury to anyone, and to the west there was on the paved portion of said highway approximately three-fourths of the entire width of said highway which was open, free, clear and unobstructed, upon which the plaintiff could have driven his car had he had the same under control or been observing the conditions on said highway and the traffic thereon, but that the plaintiff failed to drive said car either to the west or to the east but drove said car into the car of the defendant on the east side of said paved portion of said highway and while the car of the defendant was extending over onto the graveled portion to the east of said paved portion of said highway.

22] This defendant now shows to this Honorable Court that the collision was brought about solely because of the negligence of the said plaintiff, J. D. Shelton, in the operation of said automobile and that said negligence consists of the following:

(a) That the said J. D. Shelton was driving his car

at a high, reckless and dangerous rate of speed, the exact speed at this time being unknown to this defendant, but that under the circumstances shown that the said speed was excessive and dangerous.

(b) That the said plaintiff herein failed to keep a proper lookout for the traffic and conditions on said highway at said time and was, therefore, guilty of negligence by virtue thereof.

(c) That the plaintiff failed to use ordinary care in the handling and operating of said automobile in that he drove the same in a careless and negligent manner and had ample room and a free, even and unobstructed highway on both the right or left or east and west of defendant's car, but that he failed to drive said car either to the right or left of defendant's car, and that such act of driving plaintiff's car into defendant's car was unnecessary and constituted negligence on the part of the plaintiff herein.

(d) That the plaintiff was further negligent in that he failed to keep his car under control so that he could stop the same within the assured clear distance ahead, and that the defendant herein and her car were clearly visible to the said plaintiff and that she entered said highway and was rightfully thereon and had the right-of-way when plaintiff approached her car, and by virtue thereof, said plaintiff was guilty of negligence.

(e) Defendant further shows to this Honorable Court that the plaintiff, J. D. Shelton, was further guilty of negligence in that he failed to have his brakes and car in good condition as required by the Laws of the State of Oklahoma, and that said brakes did not meet the test as required by the Laws of the State of Oklahoma and were faulty and defective.

23] This defendant now shows to this Honorable Court that the plaintiff, Venera Shelton herein and the plaintiff J. D. Shelton owned the automobile in which they were driving jointly, and that they were on a joint mission for the use and benefit of both J. D. Shelton and his wife, Venera Shelton, and that both of said parties were contributing to the expenses of said trip with joint funds and for the

joint benefit, interest and pleasure of themselves and their family. This defendant further shows in addition to the above, that the automobile was acquired by the plaintiffs Venera Shelton and her husband J. D. Shelton with community property funds and the expenses for said trip and used thereon were community funds, and Vernon's Civil Statutes Annotated, Revision of 1925 provides with reference to the acquisition of property as follows:

"Section 4619

"All property acquired by either the husband or wife during marriage, except that which is the separate property of either, shall be deemed the common property of the husband and wife. * * * *"

"Section 4613

"All property of the husband, both real and personal, owned or claimed by him before marriage, and that acquired afterwards by gift, devise, or descent, and also the increase of all lands thus acquired, shall be his separate property. * * * *"

"Section 4614

"All property of the wife, both real and personal, owned or claimed by her before marriage, and that acquired by her by gift, devise, or descent, as also the increase of all lands thus acquired, shall be the separate property of the wife. * * * *"

That said plaintiffs, husband and wife, were by virtue of said Law and the fact that said parties by their joint efforts acquired said automobile and the funds with which they were using to make said trip became jointly interested financially and as partners or joint operators of said automobile on said occasion, and did thereby become the duty of both of said plaintiffs to use reasonable care and caution in the operation of said automobile in the carrying out of said venture or trip, and that it was the duty of Venera Shelton to keep a lookout on said highway in order to warn her husband J. D. Shelton of any dangers that might be encountered and to advise him of any traffic or unusual conditions,

but that the said Venera Shelton, without any regard to the rights of others and wholly failing in her duty to keep a lookout, failed, neglected, declined and refused to look down said highway but was looking at various and sundry objects along said highway and off of the same and directing her attention solely to other matters and wholly disregarding her duty to observe said highway or the traffic thereon or to warn her husband of any approaching danger, and by virtue of the Laws of the State of Texas and the relationship as hereinabove set out, the said Venera Shelton was negligent and was also liable for the negligence of her said husband in the operation of said automobile at the time mentioned herein, and by virtue of the fact that the said Venera Shelton knew that the said plaintiff, J. D. Shelton, was driving said car in a reckless, careless and dangerous manner as hereinabove set out, she failed to protest, remonstrate, or in anywise caution the said J. D. Shelton although she knew that the same was dangerous and unwarranted under the circumstances.

This defendant now shows that by virtue of the negligence of the said plaintiffs above, the said collision herein complained of was brought about and the said car of the plaintiffs was driven violently at a high rate of speed, skidding for 66 feet on said highway, into and against the right-hand side of defendant's car and practically destroying and demolishing said car and striking the same with such force that it destroyed said car for further use as an automobile and it was necessary that the same be sold for junk.

This defendant now shows to this Honorable Court that she was in nowise guilty of negligence and that the collision and damage was brought about solely by the negligence of the plaintiffs J. D. Shelton and Venera Shelton, as hereinabove detailed and hereinabove set out, and this defendant shows that in case the Court should find that she was in anywise guilty of negligence, which she specifically denies, that nevertheless, the plaintiffs herein were guilty of contributory negligence by virtue of the conduct of the said plaintiffs as hereinabove set out, and by virtue thereof, the defendant is in nowise liable to the plaintiffs herein or either or any of them.

Wherefore, this defendant prays that the plaintiffs take nothing by reason of this action and that she have her costs herein expended.

25] Cross-Complaint

Comes now the defendant, Mrs. Minnie Franklin, and for her cross-complaint and for cause of action against the plaintiffs, J. D. Shelton and Venera Shelton, and shows to the Court as follows:

1. The defendant hereby adopts all the allegations set out in her answer hereinabove which are in anywise pertinent or material herein, and makes the same a part of this cross-complaint as if fully set out in words and figures herein, and in addition thereto, shows to the Court the following:

2. This defendant now shows to this Honorable Court that her automobile was damaged beyond repair and the said car was sold for the sum of $700.00 and was worth at the time of the collision complained of, approximately $1,700.00, the same being a second-hand, well-worn 1953 Cadillac automobile and having been purchased by this defendant as a used car.

3. This defendant further shows that on account of the impact and the great force with which the plaintiff, J. D. Shelton, drove said car against the car of this defendant, the defendant was thrown from said automobile and knocked a great distance down on the gravel portion of said highway and received a concussion of the brain by virtue thereof, a great shock to her nervous system, and that she was unconscious for several days and was cut through the left eye, through the head, through the scalp, in the face, and received a fracture of the second, third and fourth ribs anteriorly and posteriorly, and received a severe shock to her entire nervous system, and that she was confined to the Ardmore Hospital, Ardmore, Oklahoma, for approximately three weeks and has suffered great physical and mental pain and anguish, and that on account of the injuries to her head, she has continued to suffer and will continue to suffer severe headaches, and that it is necessary for her to receive medical aid and attention on account of the injuries

thus sustained.

4. In addition to the above, this defendant shows that she is a woman of 65 years of age and that prior to said time she was able to perform a major part of her household duties and was in general good health, and since said time, she is highly nervous and it is difficult for her to rest or
26] sleep and she is unable to do manual labor or care for her household duties, and that she has received disfiguring scars in and about her face, and prior to her injuries she attended Church and other public functions, but since said time it is greatly embarrassing to her to be seen in public on account of such disfiguring scars and injuries, and that on account of all such damage, pain, disfigurement and suffering, she has been damaged in the sum of $100,000.00.

5. This defendant shows that she has been forced to and did expend the sum of $249.50 for hospital bills, and that she has expended for nurses and attendants care as follows: to Mrs. Ethelyn Wallas, $80.00; Mrs. Grace Brown, $30.00; Mrs. Sally Tripp, $64.00; Mrs. Nord Jones, $120.00, and that in said collision her glasses were broken and crushed into her face, and that it was necessary to replace said glasses at a cost of $30.00, and that she has paid to Dr. Ray B. Graybill approximately $150.00 and will be required to expend or pay out approximately $300.00 to $500.00 per year depending on the nature of her injury in the future for medical bills and attention, and that this defendant has a life expectancy of 8.5 years, and that she will likely expend, although the same is an estimation upon her part, the sum of $4,250.00.

6. That by virtue of all the above, this defendant shows that the plaintiffs, J. D. Shelton and Venera Shelton, are liable to this defendant on account of such damages in the amount of $105,973.50.

27] Wherefore, this defendant prays for judgment over and against the plaintiffs in the sum of $105,973.50 and

for cost of this suit, and for such other and further relief as to this Court may appear just, right and proper in the premises.

R. A. Howard and
John B. Ogden
Attorneys for Defendant
By John B. Ogden

Filed Dec. 29, 1955.

29] Answer To Cross-Complaint

To The Honorable W. R. Wallace, Judge,

United States District Court:

Come now the plaintiffs in the above entitled and numbered cause and subject to Plaintiffs' Motion to Strike previously filed herein, in answer to the allegations and averments of defendant as set forth in her Answer and Cross-Complaint on file herein, says:

I. Your plaintiffs admit that defendant Minnie Franklin was operating an automobile on July 3rd, 1955 south on U. S. Highway 77 as alleged in the paragraph beginning on bottom of page 2, and denies the other allegations set forth in said paragraph and state that at the time of the accident complained of there was no business or residential area or section along the west side of said highway, and for approximately one-half mile north and south along the east side of the highway from the point where the accident occurred there are only some two or three business establishments of any consequence.

II. Your plaintiffs deny the allegations contained in the paragraph beginning the third line from bottom of page number three.

30] III. Your plaintiffs are unable to either deny or admit the allegations contained in the paragraph beginning with the seventh line on page four, other than they do deny that there is more than one restaurant or cafe located

near the point where the accident occurred.

IV. Your plaintiffs are unable to either deny or admit the allegations contained in the bottom paragraph of page four.

V. Your plaintiffs deny the allegations contained in the paragraph beginning with line 4 on page 5.

VI. Your plaintiffs deny the allegations set forth in the paragraph beginning with line 8 of page 5 and say that plaintiff John D. Shelton, driver of plaintiffs' automobile, approached said area where the accident occurred and continued in a cautious, careful and prudent manner.

VII. Your plaintiffs are unable either to deny or admit the allegations contained in the next to the last paragraph on page 5.

VIII. Your plaintiffs deny the allegations contained in the paragraph beginning with the last of page number 5.

IX. Your plaintiffs deny the allegations contained in the last paragraph of page 6 other than to admit that plaintiff drove his car neither to the west nor to the east.

X. Your plaintiffs deny the allegations contained in the first paragraph of page 7 as well as sub-paragraph's a, b, c, d, and e thereunder.

31] XI. Your plaintiffs deny all of the allegations of fact set forth on page 8 and the top half of page 9, other than to admit that the station wagon in which plaintiffs were riding at the time of the accident was the community property of plaintiffs J. D. Shelton and Venera Shelton under the community property laws of the State of Texas.

XII. Your plaintiffs deny the allegations set forth in the paragraph in the middle of page 9.

XIII. Your plaintiffs deny the allegations set forth in the last paragraph on page 9 next to the prayer.

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XIV. Your plaintiffs can neither admit nor deny the allegations contained in paragraph number 2 of page 10.

XV. Your plaintiffs can neither admit nor deny the allegations contained in paragraph number 3 of page 10, other than they do deny the nature and extent of the injuries therein alleged.

XVI. Your plaintiffs are unable either to admit or deny the allegations contained in paragraph number 4 of page 10, other than to specifically deny that defendant Minnie Franklin has been damaged in the sum of $100,000.00.

XVII. Your plaintiffs are unable either to admit or deny the allegations contained in paragraph number 5, page 11.

XVIII. Your plaintiffs deny the allegations contained in paragraph number 6, page 11.

32] Wherefore, Premises Considered, it is the prayer of your plaintiffs that the defendant herein take nothing by her Cross-Complaint, and that your plaintiffs recover as set forth in their prayer in their original Complaint on file herein, all of which they will ever pray.

R. M. Mountcastle and
Howard S. Smith
Attorneys for Plaintiffs
By Howard S. Smith

Filed Feb. 27, 1956.

28] Motion To Strike

II. Comes now the Plaintiffs and move the court to strike that portion of Defendant Answer hereinafter set forth for the reason that the same does not constitute a defense, is redundant, irrelevant, immaterial and does not tend to prove or disprove any material issue in this case.

III. Last unnumbered paragraph on page two, all of pages 3 and 4 and the last full unnumbered paragraph on page 5,

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and last unnumbered paragraph on page 6.

IV. Beginning at top of page 8, the first unnumbered paragraph in reference to Community Property Laws, State of Texas.

Howard S. Smith and
R. M. Mountcastle
Attorneys for Plaintiffs
By R. M. Mountcastle

Filed Jan. 4, 1956.

S-1] Order Sustaining Plaintiff's Motion To Strike

Plaintiffs' motion filed with the Clerk of this Court on or about January 3, 1956, to strike portions of Defendant's Answer, previously came on to be heard at pretrial, and the parties, plaintiffs and defendant, appearing by and through their counsel of record, who submitted oral argument followed by briefs in support of and against the same, and after having fully heard and considered the same, the Court is of the opinion and finds on the 11th day of September, 1956, that the motion should be and is hereby sustained.

W. R. Wallace,
U. S. District Judge, Northern, Eastern, and Western Districts of Oklahoma.

Filed Sept. 11, 1956.

33] Verdict

We, the Jury, find that the negligence of the defendant was the sole proximate cause of this accident and therefore find in favor of the plaintiffs, and against the defendant, for the following amounts of damage:

J. D. Shelton	$53,181.--
Venera Shelton	6,125.--

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Larry Shelton	$20,375.--
Robert Shelton	$ 2,750.--
Pamela Shelton	$ 400.--
Anita Shelton	$ 400.--

September 14, 1956 (Date)

William E. Hyde. (Foreman)

Filed Sept. 14, 1956.

34] Journal Entry of Judgment

Now on this the 11th day of September, 1956, came the plaintiffs J. D. Shelton and his wife Venera Shelton, suing on their own behalf and Pamela Shelton, Larry Shelton, Anita Shelton, and Robert Shelton, minors, suing by their father and next friend J. D. Shelton and the said J. D. Shelton and Venera Shelton appearing in person and by their attorneys of Record, Howard S. Smith and R. M. Mountcastle, who are attorneys of record for all the plaintiffs, and also came the defendant Minnie Franklin in person and by her attorneys of record John B. Ogden and R. A. Howard, and this cause came on for trial pursuant to regular assignment before a jury of twelve good men and women, who being duly empanelled and sworn, well and truly to try the issues joined between plaintiffs and defendant and a true verdict render according to the evidence; and testimony having been produced by both plaintiffs and defendant the entire day of September 11th, 12th, and the cause having been finally submitted to the jury at three o'clock in the afternoon of September 13th, 1956, and the Court and the jury having heard the evidence, the jury having heard the charges of the Court and the argument of counsel proceeded to deliberate thereon as required by law, upon the law and the evidence, and now, therefore, on this the 14th day of September, 1956, the jury returned a unanimous verdict in open court and upon their oaths say in words and figures as follows, to-wit:

35] [The verdict is reproduced above.]

And the Court upon due consideration of the verdict of the jury as above set forth and rendered in open court, does

hereby approve the same in every respect.

It Is Therefore Considered, Found, Ordered And Adjudged by the Court as follows, to-wit:

I. That the said J. D. Shelton suing in his own behalf do have and recover of and from the defendant, Minnie Franklin, the sum of Fifty-three Thousand One Hundred Eighty-one Dollars ($53,181.00).

II. That the plaintiff Venera Shelton suing in her own behalf do have and recover of and from the defendant, Minnie Franklin, the sum of Six Thousand One Hundred and Twenty-five Dollars ($6,125.00).

III. That J. D. Shelton as next friend of Larry Shelton do have and recover for and on behalf of Larry Shelton of and from the defendant, Minnie Franklin, the sum of Twenty Thousand Three Hundred and Seventy-five Dollars ($20,375.00).

36] IV. That the plaintiff J. D. Shelton as next friend of Robert Shelton do have and recover for and on behalf of Robert Shelton of and from the defendant, Minnie Franklin, the sum of Two Thousand Seven Hundred and Fifty Dollars ($2,750.00).

V. That the plaintiff J. D. Shelton as next friend of Pamela Shelton do have and recover for and on behalf of Pamela Shelton of and from the defendant, Minnie Franklin, the sum of Four Hundred Dollars ($400.00).

VI. That the plaintiff J. D. Shelton as next friend of Anita Shelton do have and recover for and on behalf of Anita Shelton of and from the defendant, Minnie Franklin, the sum of Four Hundred Dollars ($400.00).

It Is Further Considered, Found, Ordered And Adjudged by this Court that all of the above named sums of money draw interest at the rate of Six per cent (6%) per annum from the 14th day of September, 1956, until paid.

It Is Further Considered, Found, Ordered And Adjudged by this Court that the plaintiffs do have and recover of and from the defendant, Minnie Franklin, all proper costs to be

taxed as provided by law, for all of which let execution issue. For good cause shown it is further ordered, adjudged and decreed by this Court that the execution of this judgment be stayed and any proceedings to enforce said judgment be stayed pending the disposition of a motion for new trial, filed herein pursuant to Rule 59, Rules of Civil Procedure.

W. R. Wallace
United States District Judge

OK: R. M. Mountcastle, Howard S. Smith, by R. M. Mountcastle, Attorneys for Plaintiffs. OK as to form: John B. Ogden, R. A. Howard, by John B. Ogden, Attorneys for Defendant.

Filed Sept. 14, 1956.

37] Motion For New Trial

Comes now the above named defendant and moves the Court to vacate, set aside and hold for naught the verdict of the jury returned herein on the 14th day of September, 1956 and to vacate, set aside and hold for naught the judgment of this Court entered in pursuance thereto on the 14th day of September, 1956 and to grant a new trial in this cause for the following reasons and on the following grounds which materially effected the substantial rights of this defendant and prevented this defendant from having and receiving a fair and impartial trial:

1. This defendant shows to this Honorable Court that the verdict and judgment is not supported by the evidence.

2. This defendant as a further ground for motion for new trial shows to this Honorable Court that the verdict and judgment is not supported by the law.

3. This defendant as a further ground for motion for new trial shows to this Honorable Court that said verdict is contrary to the evidence.

4. That said verdict and judgment is contrary to the law.

5. That said verdict and judgment is contrary to both the law and the evidence herein.

6. This defendant shows to this Honorable Court that the Court erred in refusing to give defendant's requested instruction number 1.

38] 7. This defendant shows to this Honorable Court that the Court erred in refusing to give defendant's requested instruction number 2.

8. That the Court erred in refusing to give defendant's requested instruction number 3.

9. That the Court erred in refusing to give defendant's requested instruction number 4.

10. That the Court erred in refusing to give defendant's requested instruction number 5.

11. That the Court erred in refusing to give defendant's requested instruction number 6.

12. That the Court erred in refusing to give defendant's requested instruction number 7.

13. That the Court erred in refusing to give defendant's requested instruction number 8.

14. That the Court erred in refusing to give defendant's requested instruction number 9.

15. That the Court erred in refusing to give defendant's requested instruction number 10.

16. That the Court erred in refusing to give defendant's requested instruction number 11.

17. That the Court erred in refusing to give defendant's requested instruction number 12.

18. That the Court erred in refusing to give defendant's requested instruction number 13.

19. That the Court erred in refusing to give defendant's requested instruction number 15.

20. That the Court erred in refusing to give defendant's requested instruction number 16.

21. That the Court erred in refusing to give defendant's requested instruction number 17.

22. That the Court erred in refusing to give defendant's requested instruction number 18.

23. That the Court erred in refusing to give defendant's requested instruction number 19.

39] 24. That the Court erred in refusing to give defendant's requested instruction number 20.

25. That the Court erred in refusing to give defendant's requested instruction number 21.

26. That the Court erred in refusing to give defendant's requested instruction number 22.

27. That the Court erred in refusing to give defendant's requested instruction number 23.

28. That the Court erred in refusing to give defendant's requested instruction number 24.

29. This defendant shows to this Honorable Court that she duly presented to this Court said instructions above referred to as Defendant's Requested Instructions, and that the same were refused by this Court, to which action she duly excepted, and that by virtue of failing to give such instructions the theory of the defense of the defendant as outlined by the pleadings were not presented to said jury and that she was entitled to have said instructions given to the jury, and by virtue thereof, this defendant was prevented from having and receiving a fair and impartial trial.

30. This defendant further shows to this Honorable Court that during the trial of said cause and while the plaintiff J. D. Shelton was on the witness stand testifying

and without any cause or provocation whatsoever, the said J. D. Shelton began to cry while sitting on said witness stand in plain view of the jury, and that his crying and sobbing caused and created in the minds of said jury sympathy for said plaintiff and prejudice against this defendant, and that at the same time the said plaintiff Venera Shelton began to cry audibly and that said jury could see both of said plaintiffs and could hear them crying and sobbing, and that the same created a commotion in the Court and caused the proceedings to momentarily halt and stop, and that it was apparent that the jury was greatly affected thereby, and that all of such conduct on the part of both of the plaintiffs last named caused and created in the minds of the jury great sympathy for the plaintiffs and prejudice against this defendant. This defendant now shows that there was no cause for such conduct and that the same constituted improper
40] conduct on the part of the plaintiffs herein, and this defendant believes and therefore alleges that by virtue thereof she was prevented from having and receiving a fair and impartial trial in this cause and that at said time this defendant then and there and immediately moved the Court to declare a mistrial on account of the conduct above referred to on the part of the plaintiffs, and that the said Court overruled said motion and request for a mistrial, to which action of the Court defendant duly excepted.

31. This defendant further shows to this Honorable Court that this Court admitted incompetent and prejudicial evidence on behalf of the plaintiff herein in that this Court permitted the plaintiff Venera Shelton to testify that her left eye was knocked out in the accident complained of and out of which the litigation grew, and that she testified that she was injured internally, that her female organs were destroyed and that her whole body and the organs thereof, internal and external, were injured and destroyed, and that the plaintiff Robert Shelton was dangerously and seriously injured and that he could not sleep at night, that his nervous system was destroyed and injured, that he could not do any good in school and make progress, and that he was injured throughout his entire body, both internally and externally, and that said plaintiff Venera Shelton further testified that the plaintiff Larry Shelton was injured internally and externally and that his nervous system, brain and other organs were permanently and totally injured and

destroyed and that he could not sleep at night and that he could not apprehend or comprehend the ordinary things of life and that he would have nightmares and other damaging experiences, all over the objection of this defendant and the protest of this defendant, and this defendant now shows that the said Venera Shelton was not a medical doctor and had no medical training and was not authorized or qualified to make such statements to the jury, and that all of such incompetent evidence highly prejudiced the jury against this defendant and prevented her from having and receiving a fair and impartial trial. This defendant further shows to this Honorable Court that in addition thereto the said
41] plaintiff Venera Shelton testified as to the damage as to her husband, the damage as to his organs, internally and externally, all over the protest and objection of this defendant. This defendant further shows that the said Venera Shelton also testified as to the physical condition of her daughters Pamela Shelton and Anita Shelton, and she testified as to their injuries and damage to their body, both internally and externally, all over the protest and objection of this defendant. That such testimony was wholly incompetent and highly prejudicial and caused the jury to become inflamed, and that the said defendant duly moved to strike said testimony and objected to its admission and excepted to the ruling of the Court thereon in permitting said witness to so testify.

32. This defendant further shows to this Honorable Court that the plaintiff J. D. Shelton was permitted to testify as to the injuries to himself, both internally and externally, and to the other members of his family, plaintiffs herein, all over the objection of this defendant, and that the same constituted error and that the same prevented the said defendant from having and receiving a fair and impartial trial and caused the jury to be inflamed and prejudiced against this defendant and biased in favor of the plaintiffs herein.

33. This defendant further shows to this Honorable Court as a further ground for new trial that there was no medical evidence of any kind, character, nature or description offered to show or tend to show that the said plaintiff Venera Shelton suffered any injuries whatever or that the plaintiffs Pamela Shelton and Anita Shelton suffered any

injuries whatever, and that said alleged cause of action on behalf of said plaintiffs last above named should not have been submitted to the jury by virtue of a lack of evidence, and in connection therewith this defendant shows to this Honorable Court that she moved the Court to instruct the jury to return a verdict in favor of the defendant as to the said plaintiffs Venera Shelton, Pamela Shelton and Anita Shelton, and that the same was overruled and the defendant duly excepted thereto. This defendant further shows to this Honorable Court that the defendant herein moved for an instructed verdict at the close of the evidence on be-
42] half of the plaintiffs in addition to the motion last above mentioned, and the same was overruled, to which action of the Court the defendant duly excepted.

34. This defendant further shows to this Honorable Court that she plead in this cause as shown by the answer and cross-complaint on file herein, the Statutes of the State of Texas, but that upon the opening of the trial on the 11th day of September, 1956, the Court struck from said answer and cross-complaint said allegations with reference to the community laws of the State of Texas and the ownership of the automobile and the funds used for the trip by plaintiffs J. D. Shelton and his wife Venera Shelton, and struck all of the allegations with reference to the joint enterprise of said plaintiffs and sustained the motion of the plaintiffs to strike the same from the answer and cross-complaint, to which action of the Court the said defendant duly excepted.

35. This defendant further shows to this Honorable Court and as a further ground for a motion for new trial, that the defendant herein tendered proof and offered to prove that at the place involved herein that the same constituted a business district as defined by the Laws of the State of Oklahoma, and that the defendant offered to prove that on both sides of the highway the Highway Department of the State of Oklahoma had leveled the same and covered the same with gravel, chat or road material and made the same practically level with the surface of the pavement in order that the public might cross said highway from east to west or from west to east, and that it was the practice and custom of the public generally to exercise said privilege and to travel across said highway from east to west and from west to east and that the same was discernible to any traveler on the

highway, and by virtue thereof, the same would constitute a public driveway on both sides of the highway authorized and maintained by the State of Oklahoma for the purpose of accommodating the users of said highway in crossing from east to west and from west to east at said point, and that said proof on the part of said defendant was stricken
43] and that the Court struck from the answer and cross-complaint of the defendant herein the allegations with reference thereto, being the allegations with reference to the use of both sides of the highway by the public and its maintenance, and struck all of the allegations with reference to the custom of using said highway in crossing from east to west and from west to east by the public generally and the maintenance by the State of Oklahoma for said purpose, to which action of the Court in rejecting said evidence and striking from said answer said allegations, this defendant duly excepted at said time.

36. This defendant further shows to this Honorable Court that she filed herein a motion to either strike from this cause the plaintiffs whose cause of action was not common or to direct said trial be had as to the plaintiffs whose alleged cause of action was common and to hold in abeyance the trial of the other plaintiffs, and that the Court overruled said motion and that the same constituted error, and this defendant now shows to this Honorable Court that the cause of action on the part of the six plaintiffs was not common as to this defendant, and that to permit all of said Plaintiffs to maintain said action under such circumstances put an additional burden upon this defendant and prevented her from having and receiving a fair and impartial trial, and by virtue thereof, she is entitled to a new trial in this cause.

37. This defendant further shows to this Honorable Court for a further ground for a motion for new trial, that the admission of other and further incompetent and prejudicial evidence on behalf of and on the part of the plaintiff herein over the objection of this defendant, which evidence was prejudicial, prevented this defendant from having and receiving a fair and impartial trial.

38. This defendant further shows that this Court rejected certain evidence in addition to the evidence referred

to above offered by this defendant, which evidence was competent and material and which was by the Court refused, to which action of the Court the defendant duly excepted.

38A. The Court erred in permitting counsel for plaintiff to argue said matters dividing the argument improperly all as more fully appears from the record herein.

44 | 39. This defendant further shows to this Honorable Court that she does not have and was not furnished with a copy of the instructions, but that before said instructions were read to the jury, counsel for both plaintiffs and defendant appeared before the Court at the direction of the Court and that said instructions were read and the defendant there made certain exceptions to the instructions as follows: On page 5 of the instructions beginning with the last paragraph said defendant duly excepted to said instruction, the exact number thereof being at that time and at this time unknown to this defendant, but that this defendant dictated to the reporter in the presence of the Court and opposing counsel exception and objection to said instruction. That the giving of said instruction in her opinion was improper under the circumstances especially in view of the other instructions given by the Court, and this defendant feels and therefore alleges that the whole instruction did not give to the jury a full and complete statement of the law, and that said instruction mentioned above was prejudicial to her and for such reason a new trial should be granted in this cause.

40. This defendant further shows to this Honorable Court that on page 6 of the original instructions as read by the Court to the jury, same being un-numbered beginning with the last paragraph on page 6 and continuing on page 7, the said defendant excepted to said instruction before the same was given and excepted to the Court giving the same and so stated to the Court the objection thereto. This defendant shows that there was error therein and by virtue thereof she is entitled to a new trial.

41. This defendant shows to this Honorable Court that on page 8 there is an un-numbered instruction with reference to an emergency situation, to which the defendant excepted, and this defendant shows that if the Court instructed on the

emergency question as therein presented, the Court should have also instructed the jury to the same effect with reference to the defendant and should have so told the jury in the opinion of this defendant, that the defendant could not be excused on account of a sudden emergency if he himself brought about the emergency, and this defendant so asked the Court to so instruct, which was refused and to which
45] action defendant excepted, and this defendant now shows that the giving of such instruction under such circumstances constituted error, to which she duly excepted.

42. As to instruction numbered 8A, this defendant most respectfully shows to this Honorable Court that the said instruction was an improper statement of the law under the facts as shown in this case and the giving of such instruction was erroneous as this defendant views it and to which this defendant duly excepted.

43. This defendant further shows that on page 9 this Court gave an instruction to which the defendant duly excepted at said time, said instruction being un-numbered but appears on page 9 of the original instructions, and that the giving of said instruction was error and prevented her from having a fair trial, and by virtue thereof, she is entitled to a new trial.

44. This defendant further shows that at the close of all the evidence the defendant herein moved for an instructed verdict as between plaintiffs Mrs. Venera Shelton and defendant and as between the two girls, namely Pamela Shelton and Anita Shelton, through their next friend, and that the Court overruled the same, and this defendant shows that the same was error under the circumstances and by virtue thereof she is entitled to a new trial.

45. This defendant shows to this Honorable Court that the verdict in this case was a result of passion and prejudice and that the same is not reasonable and the same is excessive under the evidence herein, and that the Court if it should overrule the motion for new trial, should nevertheless require a remittitur herein, and in case the plaintiff fails to file a remittitur that a new trial be granted for such reason and on account of such excessive verdict.

Wherefore, premises considered, this defendant most respectfully moves this Honorable Court to vacate, set aside and hold for naught the verdict of the jury returned on the 14th day of September, 1956 and the judgment of the Court based thereon and entered herein on said date, and that said verdict and said judgment be vacated, set aside and held for naught and a new trial be granted in this cause.

46] John B. Ogden and
R. A. Howard
Attorneys for Defendant
By John B. Ogden

Filed Sept. 20, 1956.

47] The Court having heard oral arguments in support of and against the defendant's motion for a new trial, and having read and fully considered the briefs submitted in connection therewith, is of the opinion and finds that the motion should be overruled.

It Is Therefore Ordered, Adjudged And Decreed that the defendant's motion for a new trial be and the same is hereby Overruled.

Done this the 27th day of November, 1956.

W. R. Wallace
United States District Judge

Filed Nov. 27, 1956.

48] Notice Of Appeal

Notice is hereby given that the defendant above named, Minnie Franklin, hereby appeals to the United States Court of Appeals for the Tenth Circuit from the verdict of the jury and the judgment of the court filed herein and entered thereon on the 14th day of September, 1956 and from the order of the court made on November 27, 1956 overruling the de-

fendant's motion for a new trial and filed herein.

Dated this the 30th day of November, 1956.

John B. Ogden
Josh Lee
R. A. Howard
Attorneys for Defendant
By John B. Ogden

Filed Dec. 4, 1956.

[By order of December 28, 1956, the time for docketing the cause in the Court of Appeals was extended to March 4, 1957.]

51]

[Clerk's Note: On the 10th day of December, 1956, the following minute entry was made on the appearance docket in said cause:

"Said cause comes on for hearing upon Motion and application of defendant to fix supersedeas bond and stay proceedings with the plaintiffs appearing by counsel, Mr. R. M. Mountcastle and the defendant appearing by Mr. John B. Ogden. Statements made by counsel.

"Entering Order directing counsel for defendant to file bond in the amount of $90,000.00 within thirty days or January 10, 1957 to be approved by the Clerk."

No formal journal entry was ever presented to the court for signature and filed in said cause.]

[By order of the Court of Appeals entered March 5, 1957, the amount of the supersedeas bond was reduced to $15,000.00.]

Franklin v. Shelton et al.

2] Transcript Of Trial Proceedings.

Muskogee, Oklahoma, September 11, 12 & 13, 1956.

Before: The Honorable W. R. Wallace, United States Judge for the Northern, Eastern, and Western Districts of Oklahoma; and A Jury.

Appearances: For the Plaintiffs: R. M. Mountcastle and Howard S. Smith. For the Defendant: John B. Ogden, R. A. Howard.

3] (A jury is duly impaneled and sworn, and opening statements are made by the attorneys for the respective side. The rule is called for and granted by the Court, and the witnesses, except the plaintiffs and the defendant, are directed by the Court to remain outside of the hearing of the proceedings.

All witnesses present and expecting to testify are sworn before leaving in accordance with the rule.)

The Court: All right, call your first witness.

CECIL CRAWLEY, called as a witness on behalf of the plaintiffs, testified as follows:

Direct Examination by Mr. Smith:

Q. State your name, please. A. Cecil Crawley.

Mr. Ogden: May I approach the bench just one moment?

(The following out of the hearing of the jury)

Mr. Ogden: I want to first object to the introduction of any evidence in this case, because since the Court's ruling this morning, the matter of the defense and rights
4] of the plaintiffs are not co-equal and all the same, and therefore they have no right to maintain this suit jointly.

For that reason I object to the introduction of any evidence and ask the Court to either dismiss the case or direct that they proceed with just one plaintiff at the time or those who are of co-equal rights and have common rights and defenses; so that was the reason that I really thought that we were entitled to show these other things with reference to the community property laws of the State of Texas and things of that kind. So we want to object to that now, then.

If the Court please also, so that I won't be doing this in the presence of the jury, our witness was going to testify that he has driven along this place for many years or months, and that he knows that it is a common usage for prople driving across from one side of the road to the other, and necessarily have to use both sides of the road to do it, both directions. On cross examination he would so testify if he was permitted to do so.

The Court: Well, I'll overrule your objection on your first statement and also the second.

Mr. Ogden: Well, just didn't want to come back up here and make an offer of proof on that.

The Court: Yes, all right. Proceed.

5] (The following again in hearing of the jury)

By Mr. Smith:

Q. State your name, please, sir.
A. Cecil Crawley.
Q. And where do you live, Mr. Crawley?
A. Princeton, Texas.
Q. Where is Princeton situated with reference to Ardmore, Oklahoma?
A. Well, Princeton is about forty miles north of Dallas, on Highway 75, off of Highway 75, on Highway 24.
Q. What age man are you? A. 55.
Q. Are you a man of family? A. Yes, sir.
Q. You reside with your family in Princeton?
A. Yes, sir.

Q. Sir, I will ask you in what occupation you are engaged, please, sir. A. I am a bus driver.

Q. Bus driver for what bus company?

A. Continental Dixie Lines.

Q. All right, sir. How long have you been employed driving a bus, please, sir?

A. I have been employed by this company 28 years.

Q. All right, and on July 3rd of 1955, were you so employed and working? A. Yes, I was.

Q. Would you tell this jury and the Court, Mr. Crawley,
6] what run you made and were making in July, and particularly July 3rd, 1955? A. I was on the route from Dallas to Ardmore, Oklahoma, and return in the same day.

Q. By the way, now far is that distance from Ardmore to Dallas? A. It would be 118 on the detour and 112 straight through the highway.

Q. Will you tell this jury how long you have been making that run from Dallas to Oklahoma, from Dallas to Ardmore and return?

A. Well, this last time, been on it ten years.

Q. You had been on it ten years?

A. On this same run.

Q. This same run? A. On this same run, yes, sir.

Q. Now, please, sir, tell us how many times a day you made that run.

A. Well, by this particular place, twice a day. I make a round trip out of Dallas to Ardmore and return.

Q. Mr. Crawley, would you explain to the jury what you mean by your statement "by this particular place"?

A. Well, the place I am speaking of is where the acci-
7] dent occurred.

Q. All right, sir, and that is the accident which is the subject of this lawsuit? A. Yes, sir.

Q. All right, sir. Now you said you made, you were traveling on this highway in the area where the accident occurred twice a day? A. Yes, sir.

Q. On July the 3rd, 1955; and how many days a week were you making it? A. Seven days a week.

Q. Now, I'll ask you, please, sir, if you observed or saw the accident which you have mentioned in your testimony, on the 3rd of July, 1955. A. Yes, sir, I did.

Q. Now let's go back a little bit, and tell this jury, please, sir, where you first saw the Shelton's station wagon.

A. Where I first come in contact with the station wagon?

Q. Yes, sir. A. It was between the Lake Murray Lodge and Overbrook. We were on a detour at the time, which it is one mile from the Lake Murray Lodge to Overbrook, back to the highway, original highway 77. We were on the detour at the time, so I had pulled in behind them somewhere between Lake Murray Lodge and the old Highway 77.

Q. Would you tell this jury now, please, sir, whether
8] you remained in signt of the station wagon from the time you first observed it until it collided with the Cadillac automobile? A. I didn't get your question.

Mr. Smith: All right, sir.

The Court: Read it to him.

Do you understand the question?

The Witness: No, I don't get what you mean.

Mr. Smith: All right, may I rephrase it?

The Court: Well, all right.

By Mr. Smith:

Q. From the time you first overtook the station wagon, did you follow it, in sight of it? A. Oh, yes.

Q. Constantly until it collided with the Cadillac?

A. Oh, yes, I did.

Q. Now would you tell this jury and the Court, Mr. Crawley, about how long in period of time that you followed it in minutes, if you have any opinion in that regard.

A. I'd say I traveled, we traveled -- I traveled behind him about eight miles.

Q. All right, sir.

A. And it taken a period of about fifteen minutes.

Q. Now Mr. Crawley, I will ask you, please, sir, if
9] you have any way of determining or telling how fast you were driving, how fast you traveled, when you are driving that Continental bus. A. Yes, we do.

Q. What do you call that instrument?

A. We have what we call a tactograph. It records our time, our stops and our speed, gives the company a record of everything that we do, every stop we make, how long we

are there, the time and everything, split second; and this tactograph is placed up in front of our driver's seat, to where we don't have to take our eyes off of the traffic or off the road to check our speed, because they are very strict on our speed in zones or even on the highway at 50 miles an hour. We get over that, we are subject to demerits, or with days off.

That's why we have the tactograph, and we have them up there to where it's convenient for us to see, check on.

Q. All right, sir. Now I will ask you if you were observing, may I call it the speedometer that morning -- you called it another name. A. Tactograph.

Q. Tactograph; were you observing your tactograph that day in your route to Ardmore? A. Yes, sir.

Q. All right, sir, and were you observing it during the time you were following the Shelton's station wagon?

A. Yes, sir, I was.

10] Q. All right, sir. And were you observing it about the time you first saw the Cadillac automobile?

A. Yes, sir.

Q. Now we will get back to that in a minute. I want you to tell this jury and the Court, please, sir, about where the accident took place with respect to any building which you might name, nearby.

A. Well, the accident happened about half a mile south of the city limits of Ardmore, Oklahoma.

Q. Was it near any building?

A. What you call a Chicken Bar, or a Chicken Snack.

Q. All right, sir. Where was it with reference to that Chicken -- could it have been Chicken in the Rough?

A. Chicken in the Rough.

Q. All right, sir. Where, with reference to Alvin's Chicken in the Rough did the accident happen?

A. It happened right in front of it.

Q. Now Mr. Crawley, I'd like for you to tell this jury also, if you can, name any other buildings in that immediate area of where the accident took place.

A. Yes. On the north is a Phillips gasoline station, on the north of the Shack.

Q. All right. A. Then the Chicken Shack, and there's a garage, then there is a Bell Service Station.

Q. Now I want you to tell us, from your observation of

11] the area where the accident took place, from your

general knowledge of it before it took place and afterwards, do you consider yourself familiar with the area of the highway and the surroundings where the accident took place?

A. Yes, sir.

Mr. Odgen: Now if your Honor please, we object to whether he considers -- he can just state whether or not he is familiar. He asked him whether he considers himself to be familiar with it.

The Court: Objection is overruled. Go ahead.

By Mr. Smith:

Q. Are you familiar with the area then where the accident took place? A. Yes, I am.

Q. Now I want to hand you, if I may --

The Court: Let the Clerk mark it.

(Plaintiffs' Exhibit 1, being a drawing of the area, was marked for identification.)

By Mr. Smith:

Q. Mr. Crawley, I hand you a drawing which we have labeled Plaintiffs' Exhibit No. 1, which purports to be a drawing of the area where the accident took place, and I want you to look at it, please, sir, and then I want to ask you a question about it.

12] All right, sir, now I want to ask you, please, sir, if this Exhibit No. 1 of Plaintiffs, in your opinion generally reflects the area where the accident took place.

A. Yes, sir.

Mr. Smith: All right, sir, we would like to offer it, your Honor, as Plaintiffs' Exhibit No. 1.

Mr. Ogden: If I might just look at it.

Mr. Smith: Glad to, your Honor.

The Court: Is it drawn to scale?

Mr. Smith: Yes, it is drawn to scale.

Mr. Ogden: Who drew it?

Mr. Smith: I did, Mr. Ogden.

Mr. Ogden: If your Honor please, there is no evidence of the correctness of it, but we are not --

The Court: (Interposing) He says it's correct. The witness says it's correct.

Mr. Ogden: He said he drew it, so of course I don't know whether it's correct. We don't have any objection -- whatever it's worth.

Mr. Smith: I will be glad to testify if counsel wants me to.

Mr. Ogden: For whatever it's worth, we don't have any objection to it.

The Court: All right, let Exhibit No. 1 be admitted.

13] (Plaintiffs' Exhibit No. 1 was received in evidence)

Mr. Smith: May we fasten it on the board, your Honor, so the jury may see it?

The Court: Yes, that's all right.

By Mr. Smith:

Q. By the way, I haven't asked you: What type of automobiles were involved in that collision we are talking about?
A. It was a Nash station wagon and a Cadillac.

Mr. Smith: If the Court please, would you permit the witness to come over?

Would you come over here now, Mr. Crawley, please, sir, for just a minute?

(The Witness moves from the witness chair to the area

of the exhibit.)

By Mr. Smith:

Q. Would you stand right over here, Mr. Crawley, and just take that pencil and point out to the jury and to the Court where -- well, first tell me the north direction on this map. A. This is north. (Indicating)

Q. What is your highway there? Point that out to the jury. A. This is the highway. This is the west lane and this is the east lane. This is your center line.

Q. Now where is Alvin's Chicken in the Rough we have been talking about in the testimony?

A. It's on the east side of the highway.

14] Q. And point it out there. A. Right here.

Q. Now the sign in front of it, point that out to the jury, please, sir.

A. There is a sign out in front of the cafe.

Q. All right, sir. You mentioned Phillips 66 Service Station. Would you show us that on the map?

A. This is it down here on the extreme north.

Q. All right, sir. And the garage and the other station, would you show us those?

A. This is the garage. (Indicating)

Q. Have you ever seen this map before now, please, sir?

A. No, sir.

Q. Now I want you to point, or check for me there, would you please, sir, where on that highway or that map the cars actually collided. A. They, it happened right in front of this cafe. (Indicating)

Q. All right, sir. And where there, the best that you can, indicate by pencil where the cars came together.

A. Cars came together at right, in this position over on this line. (Indicating)

Q. Will you kindly stand so the ladies and gentlemen and the Court can see.

A. They came together along about here. (Indicating)

15] Q. In which direction was Mr. Shelton's station wagon traveling at the time? A. Traveling north.

Q. Would you point out there, please, sir, about where Mrs. Franklin's Cadillac was when you first saw it, and the direction in which it was traveling, please, sir?

A. Traveling south, near this sign.

Q. All right, sir.

A. When I first discovered --
Q. Will you speak up a little louder?
A. When I first discovered the Cadillac, the Cadillac was traveling south.
Q. Just tell what happened to it.
A. Well, I noticed the Cadillac, it had the front wheel whipped off the --
Q. Let me interrupt you, please, sir. What do you mean by the "front wheel whipped off"?
Q. I mean the front wheel was off the pavement on the west side.
Q. All right. A. The Cadillac went back to the left and crossed over into this lane.
Q. All right, sir.
A. In front of Mr. Shelton's station wagon.
16] Q. All right, sir, what direction generally then was the Cadillac headed when it left the west side of the highway? A. Due east.
Q. All right, sir. Now then, I believe that I'll let you go back do your seat now, please, sir, and ask you some more questions.

(The witness returns to the witness chair.)

By Mr. Smith:

Q. I want you to tell the jury and the Court about how far south of the Cadillac automobile that you were in your bus when you saw the Cadillac automobile.
A. I would say I was approximately 300 feet.
Q. All right, sir, would you tell us now, Mr. Crawley, about how far, or about -- yes, about how far the station wagon was south of the Cadillac automobile at that time.
A. I'd say he was in the neighborhood of 150 feet.
Q. In other words, the station wagon was about half way between you and the Cadillac at that time?
A. That's right, sir.
Q. Now I will ask you if you were observing your, the rate of speed you were making at that time. A. Yes.
Q. Would you tell this jury what it reflected, that is, how fast you were traveling?
A. I was traveling about 35 miles an hour.
17] Q. I want to ask you, please, sir, Mr. Crawley, if -- well, I'll ask you to tell us whether or not that the

distance which Mr. Shelton and his station wagon was at that point, whether or not he had maintained about the same distance ahead of you from and after the time you first observed him some eight miles down the road.

A. It would vary from 100 to 200 feet difference.

Q. All right, sir. Would you tell this jury and the Court now, in your opinion, how fast the Shelton station wagon was going at the time that Mrs. Shelton pulled across the highway in front of him -- Mrs. Franklin.

A. How fast the Shelton car was going?

Q. Yes, sir.

A. I'd say between 35 and 40 miles an hour.

Q. Now by the way, before I forget it, have you talked to me about this case before today? A. No.

Q. Now have you talked to Mr. Howard about this accident today? A. Yes.

Q. In other words, you have talked to both of us before we came in? A. Both of you.

Q. I believe that is your answer, I understand now.

A. Yes.

18] Q. I might ask you this: Do you know about how long you have known Mr. Howard, one of the attorneys in this case?

Mr. Ogden: If the Court please, I don't know how that possibly could be competent.

The Court: Sustained.

By Mr. Smith:

Q. Did you talk to Mr. Howard before you talked to me about the facts of this case?

Mr. Ogden: If your Honor please, I don't suppose that he -- he's not attempting, I don't presume, to impeach his own witness. Whether he has talked to Mr. Howard has nothing to do with this case at all.

Mr. Smith: We are not trying to withhold anything from the jury.

The Court: I don't think it makes any difference. I'll sustain the objection.

Mr. Smith: All right, sir.

By Mr. Smith:

Q. I want to ask you, please, sir, if Mr. Howard took you to the scene of this accident after it happened.

Mr. Ogden: If your Honor please, we object to that for the reason it's wholly incompetent, irrelevant and immaterial and has nothing to do with the case and highly prejudicial.

The Court: Overruled. Go ahead and answer.

19] By Mr. Smith:

Q. The Judge says you may answer that question. Do you understand it? A. Yes.

Q. All right, sir. Would you tell us whether or not Mr. Howard took you to the scene of the accident and the area, after this accident took place? A. Yes, he did.

Q. And would you tell us, please, sir, whether or not any measurements were made or any distances figured as to how far one could see south from, sitting in an automobile, from the point where the accident occurred down that highway while you were with Mr. Howard?

Mr. Ogden: If your Honor please, we also wish to object to this; incompetent, irrelevant and immaterial. May I approach the bench, Judge?

The Court: No, no.

Mr. Ogden: I just want to object, your Honor; incompetent, irrelevant and doesn't tend to prove or disprove anything in the case.

The Court: All right, overruled.

By Mr. Smith:

Q. Do you understand my question? A. Yes.

Q. All right, sir, what effort did you make, and just
20] tell the jury what you did. Don't tell what was said,

now. I want you to tell the jury what was done.

A. He came by the bus station, picked me up, and asked me would I go down with him to --

Q. Don't tell what was said, Mr. Crawley. Just tell what you did. A. Anyway, we went down to the scene of the accident, where the accident occurred.

Q. All right, sir. A. We get out, looked there, didn't have no measurements, only just eye-measurement, stayed there a few minutes, then we drive down the highway to see how far we could drive down the highway to get the view of the top of this hill, this rise.

Q. All right, sir.

A. So we drive down there and get out, and come back.

Q. I want you to tell us, please, sir, about how far south of where the accident occurred that you were with Mr. Howard when you could still see an automobile where the accident occurred looking north.

Mr. Ogden: Your Honor please, we object to that, incompetent, irrelevant and immaterial, unless it shows the same kind and size and height, wouldn't be competent anyway, wouldn't be otherwise.

The Court: Overruled.

21] Mr. Ogden: Exception.

The Court: Go ahead.

A. (The Witness) I would say it was between 800 and 1,000 feet.

By Mr. Smith:

Q. Now I want to come back to the accident, and I want you to tell this Court and jury just in your own words how it happened, from the time you first saw the Cadillac automobile.

A. Well, when I first saw what was going to happen, I told my patron sitting behind me to get ready --

Q. You can't say what was said, Mr. Crawley.

A. Excuse me.

The Court: Ladies and gentlemen of the jury, disregard

any statement that he made with regard to what he told his passengers.

A. (The Witness) When I first saw the car, the Cadillac, it was traveling south on the right-hand side of the road. Mr. Shelton's car, the station wagon, was traveling north on his side of the road, right-hand side of the road going north.

So Mrs. Shelton, when I noticed her car, her right front wheel was off the pavement, whipped back to the left --

Q. (Interposing) Excuse me for interrupting. You said "Mrs. Shelton".

A. I mean Mrs. -- the lady that had the Cadillac.

22] Q. Mrs. Franklin. A. Franklin.

Q. Go right ahead.

A. And she pulled, jerked back across to the left in front of the station wagon of Mr. Shelton.

Q. What happened?

A. Well, Mr. Shelton tried to stop his station wagon, and it was too close. He didn't have time to stop because the accident occurred so quick. She just jerked right out in front of him, and he applied his brakes and skidded the tires on the pavement, and jerked his car to the right.

Q. Now was there one or more automobiles coming from behind Mrs. Frankling going in her same general direction?

Mr. Ogden: Object to that as leading, if your Honor please.

The Court: Don't lead the witness.

By Mr. Smith:

Q. Tell us whether or not you saw any automobile coming down the highway from behind Mrs. Franklin.

A. Yes, sir, I did.

Q. Then would you tell us, please, sir, whether or not you saw any automobile parked or waiting to get on the slab from the east side of this highway, from Shelton's side?

A. There was two on the east side of the highway headed

23] toward the south like they were going to enter the highway.

Q. All right, sir. Would you tell this jury, please, sir, in your opinion how close to the slab of the highway the nearest car was to it, waiting to get on it?

A. I'd say between 8 and 10 feet.

Q. Now I want to ask you, please, sir, if you have ever seen or observed any "slow" signs along that area.

Mr. Ogden: Now if the Court please, we want to object to that, incompetent, irrelevant and immaterial, whether he saw any "slow" signs along the area is wholly immaterial.

The Court: Overruled. Go ahead and answer.

A. (The Witness) No, there's no signs there at all.

By Mr. Smith:

Q. Would you tell this Court and jury what the legal speed limit was, established by the State Highway of Oklahoma, in the area where the accident took place?

Mr. Ogden: To which we object, if your Honor please, that's not the proper way to prove it.

The Court: If he knows.

Mr. Smith: All right, may I rephrase my question.

By Mr. Smith:

Q. Do you know, Mr. Crawley, what the legal speed limit for a sedan automobile, or a passenger automobile was on the highway at the point where the accident took place?

24] Mr. Ogden: Same objection, your Honor please.

The Court: All right, overruled. You may answer.

A. (The Witness) Yes.

By Mr. Smith:

Q. All right, sir, would you tell us what it is, please, sir? A. 65 miles an hour.

Mr. Ogden: Same objection.

The Court: Overruled.

By Mr. Smith:

Q. Mr. Crawley, would you tell us, please, sir, what you did when the accident occurred?

A. Well, when the accident occurred, I pulled my bus off the pavement, over on the shoulder of the road, and got out, me and one or two other passengers. We run to the scene which I was the first one there.

Well, the station wagon was, I tried to get the door open, it was jammed so couldn't get the doors open, at least I couldn't by myself without help.

Well, in a split second or so there was two or three others came up there and we jerked the side of the door, caught the top and jerked it off to where we could get them out, and Mrs. Franklin's car, it hit her door about where it closes, about middle-ways of the body of the car, hit her and knocked her door open over on her side, the driver's side of her car, and knocked her out of her car onto
25] the gravel, which is on the shoulder of the road on the east side of the pavement, and it seems to me, the way I saw it --

Q. (Interposing) You can't arrive at any conclusion.

A. Anyhow, she hit on her face, scooted in this gravel.

Q. Now would you tell us what happened with respect to the Shelton family, what you did and so forth?

A. Well, I got a little boy out. He was the first one I got out, and he had a hole in the top of his head, and blood was popping pretty freely, so I get him up in my arms and I take my handkerchief and put me a pack on it, to check the blood from flowing freely.

In the meantime, someone, I told someone to call the ambulance. Someone called the ambulance, and there was one or two others walked up there, and they was trying to get Mrs. Shelton and Mr. Shelton was sitting up under the wheel, fell over the wheel with his face and all bloody. Mrs. She'ton was down under the dash, couldn't get out. To me, she was very unconscious. She didn't know anything about it.

She was knocked cold.

And by that time there was quite a number of people that gathered there, including the Highway Patrol and the ambulance. Well, I remained there for about, I guess 10 or 15 minutes. When I left there, left the scene, they still hadn't got all of Mrs. Shelton's family out of the station wagon at the time.

I had done all I could do, and I was trying to run on scheduled time, and was due there in Ardmore at 1:20; so I left there and put the little boy in the ambulance. That's when I left the scene.

Q. I hand you here, Mr. Crawley, what has been previously identified as Plaintiffs' Exhibits 5 and 6, and which are pictures of the area, and I will ask you, please, sir, to first look at Exhibit No. 6, and the evidence till show -- and your Honor, it's been stipulated that, or agreed that we may show this later with respect to it -- the evidence will show that when this picture was made, the camera was 600 feet to the south of where the accident took place, and that this automobile you see here on the west side of the highway is an automobile setting in the position on the shoulder of the highway even with where the accident took place.

Tell us whether or not that generally sets out that area. A. Yes, it does.

Q. All right, sir. Now the other exhibit, Plaintiffs' 5, was taken with the photographer standing facing south. He was standing 10 feet north of where the accident occurred, and shooting the picture looking south.

Do you identify that as the area? A. Yes, sir.

27] Q. I want to ask you, Mr. Crawley, please, sir, were you close enough before the accident occurred to observe and see Mrs. Franklin in her Cadillac automobile?

A. Yes.

Q. All right, sir. Would you tell this jury whether or not she looked both ways before starting on that left-hand turn.

A. Well, when I seen Mrs. Franklin, she was looking right due east, hadn't looked either direction, north or south.

Q. Did she give any signal that you saw before she turned? A. Not that I saw.

Mr. Smith: We pass the witness, your Honor.

Cross Examination by Mr. Ogden:

Q. Mr. Witness, your bus was quite a lot higher than an average automobile, was it not? A. Yes.

Q. Sir? A. Yes, sir.

Q. Could you tell the jury the information as to whether, how much higher?

A. Well, I wouldn't know exactly, the exact feet, no.

Q. Well, approximately what was it, just so, not to go into detail, it was just an ordinary big transportation bus like you run passengers on. You see them running down to Muskogee and everywhere, Grayhound buses are the types of buses; it was that type of bus, was it not?

28] A. I would say two and a half feet.

Q. Higher? A. Higher.

Q. Than a car. Now then, Mr. Witness, you told the Court that you could see Mrs. Franklin when you were 300 feet away, didn't you? A. Yes.

Q. And at the time you were 300 feet away, why the Shelton car was about 150 feet on down the road from you, is that correct? A. Yes.

Q. Sir? A. That's right.

Q. And so then you were 150 feet from the Shelton car, and the Shelton car was 150 feet from the Franklin car, is that correct? A. That's right.

Q. And you have just now told the jury that as you approached this place you looked and saw Mrs. Franklin, and that she was looking straight across the road and her car turned east across the road and she was not looking, is that correct? A. She wasn't looking either way up and down the road, right or left, she was just looking straight east.

29] Q. Now I want to ask you to tell this jury if Mrs. Franklin wouldn't be on the opposite side from where you were, assuming these are automobiles, if this would be a... right with the Court so it will be convenient, you can see it there and look at it, assuming that this rail in front of the jury is the highway, it does happen to run north and south, doesn't it? A. That's right.

Q. And this is to the north? A. Yes.
Q. Now then, so Mrs. Franklin was headed south, was she not? A. Yes, sir.
Q. And now she turned east across the road, is that right? A. That's right.
Q. Then she would be, have her car turn in this direction, would she not? A. Yes.
Q. And if she was driving, she would be on that side of it, is that right -- which side of it -- she would be on the left-hand side? A. Left-hand side.
Q. Is that right? A. That's right.
30] Q. All right, now you were going to the north, were you not? A. Yes.
Q. You were going to the north? A. Going north.
Q. Yes, and would you take this car and assume that this car is the car that you were driving, and assume this was the car Mrs. Franklin was driving, and tell the Court and jury if that would be about your position, just assuming that's the road there -- of course we know that's not correct -- but assuming that's the highway.
A. She wasn't in that position when I first seen her.
Q. Well, you told the Court that she was looking east.
A. Yes.
Q. Is that right; where was she when she was looking east? A. She was driving east.
Q. She was driving east?
A. She already would be.
Q. This is east, isn't it? A. Yes, it is.
Q. Would you explain to the jury how you, you were in a bus that you say is two and a half feet higher than a car, how you could look down here and see through this car and see Mrs. Franklin on this side under her driving wheel, and you driving your car down the road at that time and another car in front of you, and about to see an accident happen, just explain how you saw through that car and saw that.
A. Well, it's plainly that you can see plumb through
31] the car, regardless to how close you are to the car, in a bus.
Q. Well, you were 300 feet away? A. Yes, sir.
Q. You could look through this car, look under here and see Mrs. Franklin was looking across the highway, is that the way you do it? A. Sure.
Q. That's the way you do it; was there any other car between you and the Franklin car?

A. The Shelton station wagon.

Q. The Shelton station wagon; so you looked, you had to look over the Shelton station wagon?

A. You don't have to look over it.

Q. Sir? A. You can look over it, but it's way down lower, lower than I am.

Q. Yes, the station wagon was low to start with, wasn't it, it's lower than an ordinary car, wasn't it?

A. Well, I don't know about that, because I don't know anything about it.

Q. You was up high and you looked over the Shelton wagon, and then looked over here in through here, and saw Mrs. Franklin over here on this side of her car, and her face, and you could tell she was just looking across and

32] didn't look around, is that your testimony?

A. My testimony is just like I said. When I saw Mrs. Shelton pull across the highway, she wasn't looking either direction, north or south, right or left. She was looking direct across to the cafe, due east.

Q. You could see all that while you were watching this bus and the speedometer? A. Yes, sir, I sure did.

Q. You also told your counsel a minute ago, Mr. Howard Smith, that at the time of that accident you looked at the tactometer or tacometer, you were looking at it and you were just going 35 miles an hour.

Now would you tell the jury how you was looking at the tacometer, watching the Shelton car, watching Mrs. Franklin and doing all that, and looking at the speedometer to see how fast you were going?

A. I just got through stating to the jury how this was setting, and why the company put it up there. They place them up in front of the driver's seat until you don't have to take your eye off the pavement, off the traffic or anything other than just drive, because it's setting right direct in front of you.

Q. Just like a speedometer, isn't it, that's what it is?

A. It's like a speedometer, but it's not where the

33] speedometer sets up. It's setting up on your dash in front of you.

Q. Anyway, can you look at it here on the dash in front of you, look at the Shelton car here, and see you are going 35 miles an hour, and look at the Shelton car and see it's 150 feet ahead of you, and driving carefully, and then look

through all that and see this car and see which way this woman was looking at the same time; just tell the jury if you can do that.

A. All in one split second, I can see all three of them.

Q. All three of them? A. In one split second.

Q. Would you tell the Court and jury about what time this accident happened? A. About 1:15 p.m.

Q. All right, sir. Were you ahead or behind time?

A. I was on time.

Q. On time? A. On time.

Q. You were not behind time? A. No, sir.

Q. You was on time? A. I was on time.

Q. And that's the rate of speed that you ordinarily drive, 35 miles an hour?

A. At that particular day, yes.

34] Q. That particular day a bus, a regular transportation bus, 35 miles an hour, and that's the speed?

A. That particular day and in that particular hazard, traffic.

Q. How close do you live to the Sheltons down in Texas?

A. Oh, I'd say some 50 or 60 miles.

Q. How long, how many times have you seen them or their lawyer since the accident?

A. I never seen the Sheltons before in my life until they had the accident.

Q. I said since the accident. A. I have never seen Mr. Shelton and Mrs. Shelton until today.

Q. You never saw them since the accident?

A. No, sir, I have not.

Q. Well, you saw them at the time of the accident?

A. Saw them the time of the accident and today, the only times.

Q. And today, and now then, how many times have you seen their lawyers or anyone representing them?

A. I made a statement with him one time.

Q. You made a statement with him one time? A. Yes.

Q. Where was that? A. That was at Ardmore, Oklahoma.

Q. You met him in Ardmore? A. Yes.

35] Q. That's Mr. Howard Smith? A. Yes, sir.

Q. And you have only talked to him one time in your lifetime? A. No, I have talked to him. I have made contact with him, but that's the only time I ever made a

statement with Mr. Smith.

Q. Well, you told him how it happened, didn't you?

A. I told him how it happened.

Q. Did you give a written statement?

A. Yes, I did.

Q. Sir? A. Yes, sir.

Q. Sir? A. Yes, I did.

Q. All right, sir. When did you give a written statement? A. Oh, I don't know the exact date. He came to Ardmore, and there in the bus station.

Q. Have you worked regularly for the bus company or have you been off some?

A. This is the first I was ever off in my life.

Q. In your whole life, is that correct?

A. I have been working 37 years. I have been with this
36] company 28 years.

Q. How far did the Shelton car skid?

A. I'd say the tires skidded on the pavement from 6 to 8 feet. I didn't measure it.

Q. From 6 to 8 feet? A. From 6 to 8 feet.

Q. I will ask you if you didn't see the highway patrol measure it at 66 feet. A. No, I didn't.

Q. It didn't make tire marks on the pavement for 66 feet?

A. I don't know. I wasn't there when they measured it.

Q. Well Mr. Witness, you were the same distance behind the Shelton car, according to your testimony, as I understand it, that the Shelton car was from the Franklin car; 150 feet both ways, isn't that right? A. That's right.

Q. Then did you have any trouble stopping your bus and not hitting the Shelton car -- it was only 150 feet ahead of you, sir. A. No, sir.

Q. You had no trouble stopping? A. No, sir.

Q. No effort, was it, and you was driving about 35. Are you familiar with this country here? You have told counsel, I believe so, and would you tell us about how far is the, let's say this is the north and south, and the west lane of the pavement right here, this line here, the bottom
37] part of it. How far is it from the west line of the pavement to this where it says "fence" there?

A. I do not know.

Q. Are you able to estimate it? A. No.

Q. Well, you told the Court and jury a moment ago that you were very familiar with it.

A. I am not familiar with the feet. I don't know how many feet there is over there.

Q. You say you have driven it for many years, and you can estimate feet, can't you? A. Yes.

Q. About how many feet, I'm just asking you for your estimate, and your opinion, from the west line of the paved part of the road to this fence, this area marked here on this plat which you yourself have identified.

A. Well, I'd say 20 or 25 feet.

Q. 20 to 25 feet? A. I'd say.

Q. I'm talking about the concrete pavement, is that what you are talking about?

A. I'm talking about off the pavement, from the pavement over to the fence, that's what you asked me -- didn't you ask me the question from the pavement over to the
38] fence?

Q. That's correct, but do you know there are two different kinds of pavement, there's 20 feet of concrete slab, is that right? A. Yes, sir.

Q. Then on either side of the concrete slab there is, not Macadamized, but what is it?

A. It's a sort of a blacktop shoulder.

Q. All right, now then, how much blacktop do you have on either side of this road?

A. Oh, I'd say a couple of feet.

Q. A couple of feet. Are you talking about the edge of the blacktop to the fence or are you talking about from the edge of the concrete to the fence?

A. I am talking about the edge of the concrete over to the fence, I'd say about 25 feet.

Q. 25 feet. Will you tell us how wide the concrete slab is at that point?

A. I'd say 20 or 22 feet.

Q. 20 to 22 feet. Will you tell the jury -- these people coming down here, they were going --

* * * * *

Mr. Smith: If the Court please, may I pass this exhibit that was introduced to the jury and state to them again that one is facing, the camera facing north, 600 feet below where
40] the accident occurred. By Mr. Ogden:

Q. Now then, Mr. Crawley, would you mind to take this pencil and come down here in the presence of this jury and mark on the highway about the place that you saw Mrs. Franklin first, and put a "one", then draw a little square box

or something, put a "one" where you first saw Mrs. Franklin's car. A. She was headed south in this position here, going south right about here.

Q. This is where you first saw her car?

A. Yes, sir.

Q. Put a little box there and put a "one" by it.

Now where you have drawn this little box here and put a
41] "one", you have this little box -- let's get back over here so it won't bother the jury -- this little box, you put this "one" here.

Now this little thing, that's her car, and that's on what side of the highway?

A. On the right-hand side of it going south.

Q. Be on the west side?

A. West side of the highway.

Q. Was it over near this side?

A. It was, she was still on the pavement at the time when I first seen her.

Q. All right, headed what direction?

A. Headed south.

Q. Headed south. About how far north was she then of the place where the intersection occurred?

A. Well, a very few feet.

Q. About how many feet?

A. I'd say 8 or 10 feet.

Q. All right, on the pavement. Now then, would you tell the jury from that point when she was on the pavement headed to the south, what she did then, do next?

A. She pulled, whipped her -- pulled the front wheel off this pavement on the right, then whipped back to the left across the highway.

Q. Did she get the right-hand front wheel off the pave-
42] ment on the west side, pulled it off the pavement?

A. Yes, sir.

Q. Is that right; then after that would point her, she pulled her right-hand wheel off, that would make her point to the south and to the west, wouldn't it, so then she pointed the car to the south and west and then turned it back what direction? A. Southeast.

Q. To the southeast and then finally headed due east, is that right? A. Yes, sir.

Q. So then if you saw her here headed to the south,

she pulled her car off to the south and to the west and then turned it back to the southeast and directly across the highway to the east, is that right? A. That's right.

Q. Now how far was the farthest time she was off to the west of the highway before the accident, how far was she off A. Well, she had her front, right front wheel off the pavement.

Q. How far?

A. Well, I'd say a foot, a foot and a half.

Q. Now at that time you were, you said you were 300 feet away, were you not? A. Yes, sir.

Q. At the time she did this, when she was 8 feet south
43] of this and started to come to the right, Shelton was in sight and he was 150 feet away?

A. That's right.

Q. All right, now I will ask you to tell the Court and jury if he was only 150 feet from this point right here where the accident happened, you said, when she was right here 8 feet north of it, that would actually make him 140 feet -- she was here at this point -- now then, he drove 150 feet from the time that she was here, 8 feet south, while she turned off from the right, turned the car around to the left, drove back across this slab and got over here in front of him, is that right?

A. That's the way it happened, yes.

Q. That's the way it happened. He was driving at a high and reckless rate of speed you said awhile ago, didn't you? A. Who said?

Q. Didn't you say he was driving at a high and reckless rate of speed?

A. No. No, I didn't say a high rate of speed. I said she pulled across the highway in front of this Shelton car.

Q. Was she driving slow or fast? A. I don't know. She was driving around, I'd say 10 miles an hour.

Q. 10 miles an hour from 8 feet here and she goes out
44] here and turns around and goes --

A. (Interposing) At the time they hit her.

Q. And he drove 150 feet. A. She had been making 20 or 25 at the time she came off the pavement and whipped across here. I'm talking about the time he hit her.

The Court: I think the witness had better come back up here.

Mr. Ogden: May I have him mark this place?

The Court: All right.

By Mr. Ogden:

Q. Would you mind to take this pencil, if you will, and mark the place where the impact occurred? I mean by that where the cars came together.

A. It happened directly in fron of the Chicken Shack.

Q. On the gravel or on the pavement? If it was on the pavement, show where and put a number "2" and draw a little box. A. This happened on the concrete slab.

Q. How far on it?

A. Well, it happened about -- when her car stopped, the back wheel of her car was still on the concrete.

Q. Where did the collision take place?

A. Right where it happened.

The Court: Judge, please stand --

45] Mr. Ogden: (Interposing) I beg your pardon, Judge, I forgot that. I'm sorry. I was sitting down so the jury could see.

By Mr. Ogden:

Q. You said that the collision took place right about where the cars stopped? A. That's right.

Q. Is that correct; and the back wheels of her car was on the pavement. Where was the front wheels?

A. Off the pavement.

Q. How far? A. Well, I'd say half of her car.

Q. The back wheels, were they just barely on the pavement or --

A. They was out on the slab across here, right across this strip -- the front wheels was off the concrete slab.

Q. Now then, could you see the skid marks, about how long they were, have marks on the pavement?

A. I don't know just how long they were, because I'm not capable of measuring that. All I am interested in is just judging distance from car to car.

Q. Did you see any glass or debris or stuff fell off on the pavement where the cars came together, and stuff fell

down? A. Oh, yes.
Q. Point out where that was and put a "3" there, if
46] you would.
A. Right south, jam up against her car.
Q. Would that be at the east side of the pavement?
A. That's the east side of the pavement on the south side of her car.
Q. South side of her car, and how far out on the pavement, if you know? You can return to the stand now. I think I can ask you from here, without you standing here. Thank you.

(The witness resumes the witness chair.)

By Mr. Ogden:

Q. Did you observe the condition of Mrs. Franklin's car after the wreck? A. No.
Q. Do you know what part of her car was hit?
A. Well, it hit about even with the door, the front door, where it come to, on the door.
Q. Do you know what part of the Shelton car hit the Franklin car? A. Well, it was the front end.
Q. Front end of it. Did it hit at an angle or straight?
A. It hit at an angle.
Q. Which way was the angle? A. He was just, Mr. Shelton jerked his car -- I'd say it was setting northeast.
Q. North and east. Was it on the pavement after the
47] wreck? A. Yes, sir.
Q. The Shelton car was still on the pavement?
A. Yes, sir.
Q. Would you tell the Court and jury whether or not there was anything between this pavement here and all through this area here, which is marked 37 feet, was there anything right in that area at that time? A. Yes, two cars.
Q. Two cars, they were in this area here, is that right?
A. No.
Q. Sir? A. They was back kind of north of where the wreck happened, fixing to come on the pavement.
Q. Well, here is where you said the wreck happened, you marked it here. A. Yes.
Q. You say the cars were down here north?
A. Not that far down.
Q. How far north in feet?

A. They was about 6 or 8 feet off the pavement, headed towards the pavement.

Q. How many cars? A. Two.

Q. Two. So you tell the jury there were two cars here 6 or 8 feet from where this happened headed north, is that right? A. No, headed south.

48] Q. Sir? A. They were headed south.

Q. They were headed south? A. Yes.

Q. These cars then were headed in this direction (indicating) coming onto the highway, is that correct?

A. Yes.

Q. And then what happened to those cars, did these cars when they hit, hit those cars? A. No.

Q. What happened to those cars? A. I don't know.

Q. Who were those people in those cars?

A. I don't know.

Q. They had to see the wreck, didn't they, if they were sitting there and it happened that close?

A. I never asked them.

Q. You didn't ask them? A. No, sir.

Q. So you don't know what happened to those people?

A. No, sir.

Q. Is that right? A. No, sir.

Q. Do you know what kind of cars they were in, or any-

49] thing about them, where they was from? A. No.

Q. Would you then tell us how you could see the two cars pointed in this direction, headed like you have, like I have this pencil, that's what you said, I believe, one there and one here; how could you happen to see those two cars, wasn't one blocking your view to the other?

A. I don't know as it would but I was standing in front of them.

Q. Sir? A. When I was standing in front of them, it wouldn't block my view, would it?

Q. Oh, they were there after the wreck?

A. They were there at the time of the wreck.

Q. Well, you said --

A. (Interposing) When, whenever the car, whenever the cars had the wreck, they had stopped.

Q. Oh, when the cars had a wreck, they drove up here and stopped? A. No.

Q. Sir?

A. They was there whenever, they was fixing to come back on the pavement, onto the highway when the accident occurred.

Q. All right, Mr. Witness, you have told Mr. Smith and this jury, as I understood it, that there were two cars, like this; they were on the west, let's see, on the east side of the highway, and that they were pointed to
50] the south and east, is that right, before the wreck, fixing to come into the highway? A. That's right.
Q. Is that right; you said they were about 6 feet north of where the accident happened, didn't you?
A. Well, they, I didn't say that. I said they was off the pavement 6 or 8 feet.
Q. All right, and about how far north of where the wreck happened?
A. Well, around about that distance.
Q. 6 or 8 feet north and 6 or 8 feet back?
A. Yes.
Q. Now then, how could you see both cars, if one car was here and another here; the first one would block your vision, wouldn't it?
A. It would all depend on where you were standing.
Q. Where you were standing -- you were driving a bus, weren't you?

The Court: Just a second. If I understand it, he didn't claim to see those cars while he was in the bus. He saw those cars --

The Witness: (Interposing) That wasn't his question.

51] By Mr. Ogden:

Q. That's what I wanted to find out. When did you see the cars before the wreck or afterward?
A. The cars was there at the time of the wreck, but when the wreck happened they stopped and got out, the same way that I did. When I walked up there I could see two cars just as plain as I could see two men standing here.
Q. All right, sir. All I want to ask you -- maybe I confused you: Were those two cars there when the wreck happened or before the wreck happened? A. They was fixing to come onto the pavement, get on the highway.
Q. Did you see them before the wreck?
A. Yes, I seen them.
Q. You did. They were there before the wreck?
A. Yes.

Q. Now my question to you is, how could you see the car which was farthest north when there was a car between you and it; that's my question.

A. How do you know that they was side by side? I didn't say they was.

Q. I thought you said they were.

A. No, I didn't.

Q. Where were they, then? A. They could be -- they didn't have to come out side by side. Even if they was, I could see two cars.

52] Q. Well, I'm just asking you the question and you said they didn't have --

A. (Interposing) I saw the two cars.

Q. They didn't have to be side by side --

A. (Interposing) If they was I could still see the two cars.

Q. Were they side by side? A. I don't say they were side by side. I say they was both headed toward the pavement, fixing to come out on the highway.

Q. Well, one was between you and the other, it had to be, didn't it?

A. I don't say they was. He could have been back behind even farther than the one that was farther north.

Q. It could have been, you say?

A. It could have been that way, or it could have been south.

Q. You know -- I didn't ask you what could have happened. I asked you where they were. That's the best explanation you have for that? A. I told you they was about 6 or 8 feet off the pavement.

Q. All right, sir.

A. And they was headed southwest onto the pavement.

Q. Would you tell the jury if there were any bar ditches on this side of the road here, which would be the east side, or on the west side? A. Any bar ditches?

Q. Yes, sir. A. I wouldn't call it a ditch.

53] Q. It's just level out there on both sides of the road?

A. I think it is.

Q. Sir? A. I think it is. Water would run if it come a big enough rain, but no bar ditch there.

Q. It's level from here to here then? (Indicating)

A. Yes.

Q. And the gravel? A. I don't know about that.

Q. Well, chat or gravel or improvement by the Highway

Department? A. Well, it's on the highway, but what it is -- it's not blacktop, I am sure.

Q. Mr. Witness, I ask you, is this improved by the State of Oklahoma, the Highway Department, between this paved road and this fence? A. Yes, it is.

Q. It's leveled out and graveled, isn't it?

A. Well, I'd say it's graveled.

Q. All right, sir. Now I will ask you if the same thing is not true on the east side of the road all along here shown on this map near this garage filling station and between all in here; that's graveled and leveled out by

54] the Highway Department, isn't it?

A. Well, I wouldn't say it's all graveled.

Q. Well, you say you wouldn't say it was all graveled. Now what is it then?

A. Well, it's a good road left there, part of it.

Q. You told your lawyer here you were familiar with it. I am just asking, Mr. Witness, would you mind to tell us if --

A. I'd say it was graveled or either blacktop.

Q. Either gravel or blacktop -- between -- in front of each one of those businesses, like the truck place, the Chicken House, they have gravel or blacktop all down through there, don't they?

A. I doubt it very seriously between each business.

Q. Well, between these buildings shown in this plat, isn't that right?

A. That's right, around there it's gravel and blacktop.

Q. Either gravel or blacktop, no bar ditches there. It's level, is it not. You were down there, of course, on back south? A. Yes.

Q. Sir? A. Yes, sir.

Q. This highway extending there now, about the same

55] as it was July 3rd a year ago? A. Yes.

Q. Sir? A. Yes, sir.

Q. There has been no appreciable change, has there?

A. No.

Q. Now then, Mr. Witness, is there a motel on down there still to the south a piece?

A. Still farther down south.

Q. Yes, sir, and then a golf course and anything else down there? A. Well, there's a restaurant down there.

Q. And do you know whether or not there is a dog hospital or an animal hospital or anything like that?

A. Animal hospital still farther on down the road.

Q. In other words, if you come into Ardmore from the south like Mr. Shelton was, you'd see a motel, a golf course, sales barn, a hospital and a cafe, and a filling station and many buildings, would you not, on the right-hand side of the road? A. Well, there's quite a few there, scattered out. They are not in one section, what I mean, all together -- they are scattered all out all the way on down as far as to Overbrook.

Q. Yes, sir. Will you tell us whether or not the highway to the south, and approaching this place and coming from the south, we would say, would you tell the Court and jury whether this is a level road or whether it's hilly?

A. Well, it's not -- there's an incline, I would say --
56] coming up to this particular spot it's kind of a rise. It's not a hill. I wouldn't call it a hill.

Q. What do you call it?

A. Well, it's just more of a little incline. It slopes, it's about, I'd say a quarter of a mile long.

Q. Now Mr. Witness, you said you went out there with Judge Howard, did you not? A. Yes.

Q. And then you and Judge Howard went out down there and measured, is that right?

A. We didn't use any tape measure or anything.

Q. Yes, sir. This is Judge Howard sitting here?

A. Yes.

Q. This man here? A. Yes, sir.

Q. Now you can see the top of a car, could you not?

A. Yes, you could see the top of a car.

Q. But seeing a top of a car, you couldn't see the people in the car from that point when you and Judge Howard went out there? A. Yes, I could see it.

Q. You could see the people in it? A. Yes.
57] Q. From how far away?

A. I'd say from 900 to 1,000 feet.

Q. 900 to 1,000 feet you could see that. Now then, would you tell us, if you know, what kind of car you were in?

A. What kind of a car I was in?

Q. What kind you was looking at; we'll say it that way.

A. The kind of car I was looking at -- I didn't get --

Q. (Interposing) Well, maybe I misunderstood you. I thought you said you looked up there and saw a car.

A. No.

Q. Parked up there somewhere. Well, let me have this

picture right here. I will ask you to look at this exhibit that Mr. Smith just offered; is that the way the highway looks there? A. Yes, it is.

Q. Do you know how high the camera was off the ground when that picture was made?

A. I wasn't there. I just wouldn't know.

Q. You don't know, but if you was out there, looking from some height, whatever height that was that that camera was, that's the way it looked looking to the south, wouldn't it? A. Yes.

Q. Is that right? A. That's right.

Q. You tell the jury that's not a hill?

58] A. I wouldn't call it a hill.

Q. All right, sir. What was the condition of, where was Mrs. Franklin? You have told the jury where the Shelton people were after the wreck. Would you mind now to tell the Court and jury where Mrs. Franklin, this lady here, was after the wreck? A. After the wreck?

Q. Yes, sir. A. On her side of the car, the driver's side, which would be on the north, she was knocked -- it knocked her door open and knocked her out of the car, and scooted into the gravel on the shoulder of the road at the edge of the pavement.

Q. Was she out on the ground or on the paved part of it? A. On the gravel.

Q. On the gravel? A. The edge of the pavement.

Q. Now you described about this boy getting hurt. I will ask you to tell the Court and jury, if you know, whether or not the hole, which you said where blood was coming out of his head in this injury, was not a centimeter, about the size of my thumbnail. A. Well, I'd say it was gushing out. I don't know what size it was.

Q. Would you tell the jury what you saw about Mrs.

59] Franklin, you say you saw the whole thing.

A. Mrs. Franklin was down pinned under the dash, and at the time I was there was unable to get her out, but I could tell she was unconscious.

Q. I'm talking about Mrs. Franklin. You are talking about Mrs. Shelton.

A. I'm talking about Mrs. Shelton.

Q. Well, you said -- I'm talking about Mrs. Franklin. I asked about Mrs. Franklin. That is this woman sitting here.

A. I thought you asked me about Mrs. Shelton.

Q. No, I said Mrs. Franklin, I believe, Mr. Witness.

I asked you about where was Mrs. Franklin after the wreck.

A. I told you after the wreck, out on the gravel.

Q. Then I asked what you saw about her injuries. You described about the others.

The Court: Let's don't argue with the witness.

By Mr. Ogden:

Q. Well, it doesn't make any difference. Just tell us what you saw, if you can, please.

A. Mrs. Franklin?

Q. Yes, that's this woman right here.

A. Okay. She were laying out on the gravel, and I walked around to see how many was in her car. She was laying out there and somebody had her sitting up, and she was bleeding over her face, and she had a rag or handkerchief or something to wipe the blood away, and some of them seemed
60] to think she wasn't hurt very bad, just skinned up.

Well, I went on back to the other car. I don't know anything about what happened to her. I was interested in the children, getting them out of the car.

Q. Did you make a statement to anybody there at that time that you expected, that you had been driving behind these people and you expected something to happen?

A. No, sir.

Q. When you left, the highway patrolman wasn't even there, was he? A. No, sir.

Q. You left before he arrived? A. No, sir.

Q. Sir?

A. No, sir. The highway patrolman was there before I left.

Q. You told the jury before what time the accident happened, and I think you said 1:15, is that correct?

A. Around 1:15, yes. I was due in the station at 1:20.

Q. Sir? A. I was due in the station at 1:20.

Q. All right. A. I'd say around 1:15.

Q. Anyway, regardless of that, what time did you leave Dallas? A. I left at 10:15.

Q. 10:15, drove to Ardmore, and stopped how many times?
61] A. Well, I don't know about that. That varies, different times, different -- lots of times you will make four or five stops out in the country to let somebody off or

pick somebody up. You can't -- but I have about nine regular stops.

Q. You drove from Dallas, Texas from 10:15 -- got to Ardmore, drove 118 miles, at 1:10, is that right, or 15?

A. 1:20.

Q. Sir? A. 1:20.

Q. Is that when you were there, I thought --

A. When I was due.

Q. I know, but what time did you get to the scene of the accident? A. Along about 1:15.

Q. 1:15? A. Yes.

Q. So then you drove in three hours from Dallas to there and stopped nine times? A. That's right.

Q. And drove 35 miles an hour? A. No.

Q. Well, how fast did you drive? A. Well, I said I was driving 35 miles an hour at the time of this accident scene. I didn't mean to say that I drove 35

62] miles an hour all the way from Ardmore to Dallas, or Dallas to Ardmore.

Q. Well, how fast did you drive?

A. Well, I didn't go over 55 miles an hour nowhere.

Q. Sir?

A. Nowhere I didn't drive over 55 miles an hour.

Q. All right, sir.

A. We don't drive any faster than that.

Q. Well, after you got in behind this car of Mr. Shelton's, you never passed it, did you? A. No, sir.

Q. And you drove behind it, you said, from that point about 8 or 10 miles, I believe it was 8 miles, you drove that in 15 minutes? A. About 15 minutes.

Q. So if you drove 8 miles in 15 minutes you'd be driving about 30 miles an hour, wouldn't you, something like that? A. Well, I wouldn't say. I don't know, because I am just telling you what happened and what I saw.

Q. How come you to remember that you drove the last eight miles that day prior to this accident in 15 minutes, about the rate of 30 or 31 miles an hour?

A. Well, there's a lot of things I can tell you about the schedule of time, that automatically will come to you after a period of years. I can tell you in five sec-

63] onds of what time I will be in another town.

Q. You can tell within five seconds?

A. That's right.

Q. What time --

A. (Interposing) In normal traffic conditions.

Q. What time did you get into Marietta that day, you say you can tell?

A. I left at 1:45, I mean 12:45.

Q. 12:45 or 1:45? A. 12:45.

Q. Is that the time you were supposed to be there?

A. Yes, sir.

Q. Well, then, if you got there at 12:45, you stayed there how long? A. I didn't stay there.

Q. Didn't stay there?

A. I'm due in and I'm due out at 12:45.

Q. You had to stop and let people off down there at that drug store, and let them on, didn't you?

A. Well, that's all right. It don't take no five or ten minutes to do that.

Q. Don't take over five or ten minutes?

A. I said it wouldn't take no five or ten minutes to do that.

Q. Then it's 20 miles from --

64] A. (Interposing) That's just a matter of how fast you work your schedule.

Q. How fast you work your schedule? A. Yes, sir.

Q. It's 20 miles from -- A. (Interposing and Continuing) I can unload and reload in less than half a minute if people is out there to get on, and be gone.

Q. You mean to tell the Court you can drive up to a town and load and unload the people and start out again in less than half a minute, is that right?

A. In some stations you can. In some stations you don't even get out. I might not even have got out at that station that day. You don't know.

Q. Mr. Witness, I will hand you this record here, which purports to be for July, 1955, the bus route schedule on your bus, and look at that and tell the Court and jury whether that is correct, that's the one you was operating under. A. That's right.

Q. Sir? A. That's right.

Q. What time were you supposed to arrive at Ardmore?

A. 1:20.

65] Q. At 1:20? A. Yes, sir.

Q. You left Marietta at what time under that?

A. 1:45, I mean 12:45.

Q. 12:45. Would you let me have it, please, sir. That's 1:20, that is the time you did leave there, is it not?

A. Well, it will vary a half a minute or a minute, something like that, if I didn't catch a red light.

Q. Mr. Witness, maybe I don't see this right, but Judge -- would you mind if I walk around there where he is?

The Court: All right.

By Mr. Ogden:

Q. Only way I can do this, I guess. Maybe I don't -- I am not very familiar with these things, but there it says 1:10, is that right or wrong? A. That's right.

Q. Sir? A. That shows the schedule at 1:10, but they have it in there at 1:20.

Q. Well, you told the jury a minute ago that it was scheduled in there at 1:20.

A. I am due at 1:20. I never get there at 1:10.

Q. Well, is this right or wrong?

A. That's wrong.

66] Q. This is wrong? A. That's right.

Q. But this is the official guide filed with the State Corporation Commission, is it not? A. That's right, but that don't mean that we run by that.

Q. Oh, you don't pay any attention to that?

A. No.

Q. Just one other question, I believe, Mr. Crawley, if you don't mind: Now when you saw this man Shelton, and you saw Mrs. Franklin out there, he was 150 feet from her, you applied your brakes and you didn't even get close to either one of them, did you? A. No.

Q. Sir, before you stopped your car?

A. No, I wasn't close to them. I don't drive that close.

Q. Sir? A. I wasn't, I keep the distance back.

Q. You had no difficulty. Well, you was only 150 feet from Shelton, wasn't you, what you testified?

A. Yes, about 150 feet.

Q. You had no difficulty stopping your truck and not hit anything? A. Well, no.

Q. And where did you pull your truck off to?

A. Pulled my, when I stopped my bus I had it off the pavement.

Q. You pulled it off the pavement and hit nobody?

67] A. That's the law.

Q. You was driving the same rate of speed 150 feet from him, and he was 150 feet from her now. Now will you tell us, please, if you saw a firecracker stand there.
A. I don't recall it.
Q. Sir? A. I don't recall one.
Q. If there was one there, you didn't see it?
A. No.
Q. Well, do you know whether there's a mailbox there now? Have you seen the place recently; you pass there every day? A. I haven't been on duty since the first day of January.
Q. Have not been on duty since -- well I thought you told us this morning -- A. (Interposing) No.
Q. You haven't been on duty since the first day of January, is that right? A. That's right.

Mr. Ogden: This year, 1956. All right.

The Court: All right, anything further, Mr. Smith?

Mr. Smith: No other questions from this witness.

The Court: All right, step down.

(Witness withdraws)

The Court: You will step on the outside, Mr. Crawley, please.

68] (Witness withdraws from the court room.)

C. E. WILLIAMS, called as a witness on behalf of the plaintiffs, testified as follows:

Direct Examination by Mr. Smith:

Q. State your name, please, sir.
A. C. E. Williams.
Q. Are you employed, Mr. Williams? A. Yes, sir.
Q. Where do you live? A. I live in Ardmore.
Q. And what is your occupation?
A. I am a highway patrolman.
Q. Where are you stationed?

A. Stationed in Ardmore.

Q. How long have you been with the State Highway Patrol of the State of Oklahoma?

A. Since July 4, 1950.

Q. And what age man are you? A. 34.

Q. 34. How long have you been stationed at Ardmore?

A. Approximately four years and nine months.

69] Q. And are you familiar with the Highway No. 77 leading south of Ardmore, Oklahoma, in particular?

A. Yes, sir.

Q. And I will ask you, please, sir, on July 3rd of 1955, were you familiar with it at that time?

A. Yes, sir.

Q. And did you observe it and study it and patrol that area during that period of time? A. Yes, sir.

Q. And that is the main highway, isn't it, that leads out of Oklahoma, Ardmore, Oklahoma?

A. Traveling south, yes, sir.

Q. To the south, I'm sorry, yes, sir. Now as part of your duties as a highway patrolman, have you had occasion to familiarize yourself with the measurement and study of skid marks on highways? A. Yes, sir.

Q. Would you tell us, please, sir, to what extent you have made a study of skid marks?

A. I attended the Oklahoma Highway Patrol Institute prior to going to work as a trooper, and I have attended a retraining school since that time.

Q. Would you mind speaking up a little louder?

The Court: Can you gentlemen hear him back there?

70] By Mr. Smith:

Q. Would you mind answering that question again, Mr. Trooper, and speak a little louder?

A. I have attended the Oklahoma Highway Patrol Institute, which is required before you can go to work for the state as a trooper. I also attended a re-training school about two years ago.

Q. All right, sir. I want to ask you if you had occasion to investigate an accident which occurred just south of Ardmore, Oklahoma on Highway 77 on July 3rd of last year.

A. Yes, sir, I did.

Q. Would you tell us, please, sir, if you remember,

and you may refer to any notes you might have, when you reached the scene of the accident.

A. I arrived there at approximately 1:50 p.m.

Q. And when you arrived there, please, sir, would you tell this jury and the Court what you saw with respect to the automobiles which had been involved in the collision?

A. When I arrived there, was a Nash station wagon, I believe is what they call a Rambler station wagon, and a Cadillac sedan. The Cadillac sedan was partially on the pavement, the rear portion of the Cadillac was partially on the pavement, and the Nash Rambler was just off the east edge of the paving.

Q. Would you tell us, please, sir, what you did with traffic that was passing to and fro with respect to directing them on what portion of the highway?

A. Until we were able to get a wrecker to move the
71] vehicles, we had to direct the traffic around the portion of the car that was on the road.

Q. All right. Now state whether or not that placed the traffic over on the west side of the highway, the south part. A. Yes, sir.

Q. Now I direct your attention, Mr. Williams, to a drawing or map here on the board which has been identified as Plaintiffs' Exhibit No. 1, and which has been presented to the jury and the Court, and I first ask you if you observed any skid marks in the area where you investigated the accident on July 3, 1955. A. Yes, sir, I did.

Q. Did you make any measurement of those skid marks?

A. Yes, sir.

Q. And what means did you use to measure the length of them? A. I used a steel tape.

Q. All right, sir. Do you have in your notes or from memory how long those skid marks measured?

A. Yes, sir, I do have.

Q. Would you relate to the jury, tell us how long they were, what skid marks were down on the pavement?

A. They were 66 feet long.

72] Q. All right, sir. Now would you tell us, please, sir, which automobile caused the skid marks, from your investigation?

A. They were caused by the station wagon.

Q. Did you see any skid marks about the Cadillac, as evidence of it having skidded anywhere?

A. No, sir, I did not.

Q. Now, please, sir, would you tell, can you come here to this exhibit and take this pencil and mark for the jury the path of the skid marks that you saw on the highway that day?

Before you do that, now, would you tell us where on this map the accident took place, assuming this is the north-south U.S. Highway 67 --

The Court: 77.

Mr. Smith: 77. I'm sorry, your Honor.

By Mr. Smith:

Q. (Continuing) And that this is Alvin's Restaurant, Alvin's Chicken in the Rough, this is the sign in front of it, and this is the Phillips 66 station, and the other buildings there in the area.

Now would you first indicate by your pencil where you think the automobiles must have collided?

A. Well, it was just to the north a little ways from where --

73] Mr. Ogden: (Interposing) If your Honor please, I am going to object, unless I may ask him a preliminary question, as to where he thinks the automobiles collided would be. I think that's improper, since he was in Marietta when the wreck happened he couldn't know anything about it other than what somebody told him. He was in another town.

I would therefore ask him questions to show that, to show where he was when the wreck happened.

The Court: Well, he is an expert witness, and he is just going to tell from what he saw there.

Mr. Ogden: My point is, his opinion as to where the wreck happened, I don't think would be proper, your Honor please.

The Court: Well, overruled.

Mr. Ogden: Exception.

The Court: Go ahead.

By Mr. Smith:

Q. Would you talk up loud enough so that the jury can hear you. A. All right.

Q. I might ask you this question: Can you tell from any debris that was there on the scene where the accident happened?

Mr. Ogden: That's purely a conlusion.

Mr. Smith: It's an opinion, your Honor.

74] The Court: Well, don't argue. Overruled.

Mr. Ogden: Exception.

The Court: Go ahead.

A. (The Witness) The accident occurred just to the north, it would be to the north of a line running straight west from this sign to the highway, be just shortly north of this sign somewhere in the area along here. (Indicating)

By Mr. Smith:

Q. All right, sir. Would you mark on that map there a drawing of the skid marks as you remember them, and from any notes you made, if you have notes and want to refer to them? A. Well, they extended back from the point of impact in this manner. (Indicating)

Q. Now I will ask you, please, sir, Mr. Williams, to take this little piece of pasteboard here which has a couple of thumbtacks through it, and let that represent the Shelton station wagon, and then I will ask you to take this piece of pasteboard here, which we will let represent the Cadillac.

I will ask you now to pin those on this drawing where, in your opinion from the investigation you made and what you saw on the date you investigated it, the automobiles came to rest.

Mr. Ogden: If your Honor please, I don't want to be objecting each time. May I just have a general objection to all this line of testimony?

75] The Court: All right. Overruled. Go ahead.

By Mr. Smith:

Q. Do you understand my question?
A. I believe I do.
Q. All right, sir. I will make it briefer.

I just want you to take those two pieces of paper there I have given you and pin them on this map in the position that you think and recall from memory and notes where the two automobiles came to rest and stopped after the collision.
A. Where they came to rest?
Q. Where they came to a complete stop where they were, that's right.

(Witness complies)

Q. Now, please, sir, would you point out with pencil to this jury now where in your opinion the automobiles were when the collision took place, that is, when the station wagon hit the Cadillac.
A. You want me to mark on this?
Q. That will be all right, sir.
A. It's a little hard with this tab on here to show the front position of where the car would have been, but it would be in that position, about like this. (Indicating)

Mr. Smith: (Addressing the jury) Did you hear him?

By Mr. Smith:

Q. All right, sir. Thank you, you may return to your seat.

When did you last have occasion to study or observe this area where the accident took place, Mr. Williams?
A. Yesterday.
76] Q. All right, sir. What was the condition of the highway at the time you made the investigation of this wreck?

A. The highway was dry. It was a concrete surface. It was a very warm, sunshiny day.

Q. All right, sir. Did you also observe or had you prior or subsequent to the date of the accident, observed the grade of the highway, that is as to whether it slopes or not?

A. Yes, sir.

Q. Would you tell the jury in your own words about that, describe to the jury about that.

A. At the point of the impact it was, the highway is nearly level. It's the top of a small hill, flattened off there on the top.

Q. Since -- well, I'll ask you this: Have you had occasion in the last few days to make any type of measurement as to the distance that one could see looking south from this point down the highway, the distance one could see an automobile approaching from the south?

A. Yes, sir, I have.

Q. All right, sir. Now for the purpose of the record, the point I refer to as "this point" is the point even with the contact of the automobiles. You have that? All right, sir.

77]

Now would you tell us when you made those measurements or determined any distance? A. September the 6th.

Q. September the 6th. That's last week?

A. Yes, sir.

Q. All right, sir. Last Thursday, to be exact?

A. Yes, sir.

Q. Now would you tell us, please, sir, first what method you used in determining how far one could see to the south sitting in an automobile?

By the way, were you sitting in an automobile?

A. Yes, sir, I was.

Q. What type of an automobile were you sitting in?

A. It was a 1955 Ford.

Q. Possibly I should ask you first then, who helped you in making this measurement or determining how far you could see an automobile to the south of you?

A. I obtained the assistance of another trooper simply because we would have radio contact that way, and for the purpose of having him stop at the point where he would first come into sight from the south.

Q. All right, sir. I didn't want to interrupt you.

A. At the point where he came in sight, he was contacted by radio that he was back in signt, and the distance was measured from that point.

78] Q. Now let me ask you, what direction the other patrolman -- first, what type of car was he in?

A. It was a 1955 Ford.

Q. By the way, do you know, would you be able to tell this jury and the Court, compare the height the driver is off the ground in that type of Ford, and this type of station wagon involved in this collision?

A. Well, I'm not positive about the height the driver would be sitting. The car would probably be about, between 60 and 64 inches tall.

Q. Now would that be respecting both the drivers, both automobiles, the station wagon and the Ford? Tell us whether or not in your opinion they would be about the same distance off the ground, the drivers.

A. Be approximately the same, yes, sir.

Q. All right, sir, and by the same token, a Cadillac, a '53 Cadillac, would the driver of the '53 Cadillac be about the same distance off the ground as the driver of one of your Ford patrol cars? A. Yes, he would.

Q. Now which direction did you have the fellow trooper traveling on the highway when you instructed him, or when he assisted you in these measurements?

A. He traveled from the south to the north.

79] Q. Now just tell us what you did when he came into sight in his automobile, coming from the south.

A. I called him by radio and told him that was the spot where he first came into sight.

Q. All right. A. I just said that's the spot, and from where he stopped there we measured.

Mr. Ogden: Your Honor please, I believe I will object to what he said to somebody else, or somebody else said to him, on September 6, 1956, just out of the presence of this defendant. I don't believe that would be competent evidence. I object to it for that reason.

The Court: Well, I think on arriving at the measurements, how they arrived at the measurements. A statement, of course, is not admissible outside of the presence of the defendant. I will overrule you in this particular instance.

By Mr. Smith:

Q. Now I will ask you this: Did he stop at that place where his car came into clear vision from where you were?
A. Yes, sir.
Q. Now, sir, I will ask you if you measured the distance from where he stopped in his car to the south and where you were sitting here at the point on the highway even with where the accident took place, looking south; did you make that measurement? A. Yes, sir, I did.
80] Q. By what means did you determine the distance, how did you measure it?
A. It was measured with a 100 foot steel tape.
Q. Would you tell this jury and the Court then how far you could see this automobile down to your south from where you were sitting? A. Measured 900 feet.
Q. Now Mr. Williams, I have asked you about the skid marks which you found to exist on the highway, and you have testified generally about your study of the skid marks, and I will ask you this question: Will you tell this Court and jury whether you have an opinion that you can state with reasonable certainty as to the speed of the station wagon making these skid marks immediately prior to the application of his brakes? A. Yes, sir.
Q. Would you so state in your opinion, please, sir?
A. I estimated the speed at 45 miles an hour.
Q. All right, sir. Would you tell this jury and the Court what is the lawful speed of a passenger, or a, yes, an ordinary automobile in that area where the accident took place?

Mr. Ogden: If your Honor please, we wish to object to
81] that as not the way to prove what the lawful speed is by a witness. The law fixes that and not the witness.

The Court: Well, was that in the city or outside of the city?

The Witness: It's outside the city limits, Judge.

The Court: Do you know what the speed is there?

The Witness: Yes, sir.

The Court: Objection is overruled.

Mr. Ogden: Exception.

By Mr. Smith:

Q. Would you tell us, please, sir?
A. The speed limit is 65 miles per hour in the daytime and 55 miles per hour at night.
Q. Now to the north of where this accident took -- oh, by the way, how far down, how far, do you know how far it is from the point where the accident took place to the south boundary, the city limits of the city of Ardmore?

The Court: North, it would be north.

Mr. Smith: No, sir, I wanted to know how far the accident was from the south boundary of the city of Ardmore.

The Court: I beg your pardon. Go ahead.

A. (The Witness) It's one-half mile, five-tenths of a mile.

By Mr. Smith:

Q. Five-tenths of a mile. Is there any school zones
82] or slow zones of any type along the area where this accident took place?
A. There are no slow zones, no, sir.
Q. Are there any -- do you recall whether there is a speed sign to the north of where the accident took place on the east side of the highway, to traffic entering the city of Ardmore?
A. There is one at the city limits of Ardmore.
Q. And what does that say?
A. 35 miles per hour.
Q. And how far north is that from where the accident occurred?
A. Well, it would be five-tenths of a mile north.
Q. One-half mile. All right, sir.

Did you, have you had occasion to measure the width of this highway at the place where the accident took place?

I am talking now about the hard surface of the highway.

A. Yes, sir, I have.

Q. What did you measure it with?

A. Steel tape.

Q. When was that? A. The day of the accident.

Q. All right, sir, and what was the width of the highway on that date? I'm talking about the hard surface of the highway. A. The concrete portion is 20 feet wide.

83] Cross Examination by Mr. Ogden:

Q. Now Mr. Witness, when you told the jury you could see down that road south 900 feet, see the car, did you mean you could see the top of the car or see the entire car?

A. From, I believe I stated when the car came into view, when it first started to come into view.

Q. When you said, well, now you tell the jury when you say that car first started to come into view, then you could see the top of it, is that right? A. That's right.

Q. That's what you mean. So you tell the jury that you could see the top of the car coming from the south 900 feet away but couldn't see the car itself, is that right?

A. I could see the car itself, yes, sir.

Q. If you just saw the top of it, you couldn't see the whole car?

A. I saw a portion of the car when it --

Q. (Interposing) Yes. And then as it came on up the hill, you could see more of it, is that right?

A. That's right, sir.

Q. Now I want to ask you, Mr. Williams, if it isn't a fact that the point where you have established and said in your opinion this accident happened, and the way it happened and so forth, that point, that's going downgrade going north, isn't it; isn't that downgrade?

84] A. It was very slightly --

Q. (Interposing) Downgrade?

A. Downgrade to the north.

Q. To the north; and then if you'd go to the south, go to the top of the hill, you'd start going downgrade to the south, wouldn't you; isn't that right, Mr. Williams?

A. Yes, sir.

Q. And I will ask you if it isn't a fact that just on the right-hand side of the road, going north into Ardmore, from the point where you say the accident happened and before

you get to the bottom of the hill, there's a sign says "35 miles per hour" there right now, while you are testifying, and it was there the other day?

A. I'd like for you to repeat your question.

Q. Well, Mr. Williams, if you left the scene where this accident happened and started in to Ardmore, it's only a half a mile up there to the city limits, isn't it?

A. Yes, sir.

Q. Then when you started down this hill going into Ardmore, I will ask you, before you get to the bottom of the hill, if there isn't a sign there right now put up by the Highway Department on the right-hand side of the road, says "35 miles an hour" right today? A. There is not.

Q. There is not; you say that's not true?

85] A. There is no sign there.

Q. Is there any sign in there? A. Not between the point of the accident and the city limits of Ardmore.

Q. That's what I am talking about now, between where the accident happened and the city limits; you know where the city limits of Ardmore are, don't you?

A. Yes, I do.

Q. You know where the Saddle Shop is, Randolph's?

A. Yes, sir.

Q. It's just south, just outside of the city limits?

A. Yes, sir.

Q. Now then, Mr. Witness, I want to ask you if it makes any difference in determining the speed of a car, if it skids 66 feet, or you see where the brake was applied there for 66 feet, whether that is a big car, a little car, or a low car, or a high car, or a loaded car or an empty car, is the speed just all the same or does it depend on any of the things that I have mentioned as to how fast it was going?

A. It would be figured on the average car.

Q. Well, now unless you knew that day how many people was in that car and what kind of car it was, would you be able to estimate the speed?

A. I would make the estimate as to the average, the

86] average car with the average driver.

Q. Well, the point I am trying to find out, just ask this one question and quit: Does it make any difference whether the car is loaded or empty?

The Court: He says, Judge, that he figures it on the

average car.

By Mr. Ogden:

Q. So it's all right. Now then, does it make any difference on the weight of the car, in your opinion?

The Court: He says that it does, but he figures it on the average car.

By Mr. Ogden:

Q. All right, about what did this car weigh?
A. I don't know, sir.
Q. Now then, do you know whether or not this car, this Nash car was lower from the ground than the average car?
A. I don't know that it is, no, sir.
Q. Do you think it is, from your experience?
A. It might possibly be a little bit, but it would have to be standard class to clear the road.
Q. Well, I just asked you if in your opinion -- you saw the car there, didn't you? A. Yes, sir.
Q. And so you have put these things here where you found the cars. When the accident actually happened, you were in Marietta, weren't you? A. Yes, sir.
87] Q. That's the county seat below there?
A. Yes, sir.
Q. In Love County. This happened in Carter County almost in Ardmore. Then you got this message by telephone or radio? A. By radio.
Q. By radio. Then when you got the message, you drove from Marietta to Ardmore, a distance of how many miles?
A. It's 17 miles by U. S. 77. However, 77 was closed because the bridge was out and we had to take a detour to get to Ardmore.
Q. Had to go around by Lake Murray, didn't you?
A. Yes, sir, some distance farther around the detour.
Q. About how much farther is it?
A. It's about four miles further, I believe, from Marietta to Ardmore that way.
Q. And you don't know how long it was after the accident before you got the message in the next county down there and drove up there, so you know what time that you put down, what time you arrived at the scene of the accident?

A. Yes, sir, I did.
Q. Would you tell us, please?
A. I stated I arrived at 1:50 p.m.
88] Q. 1:50 p.m.? A. Yes, sir.
Q. Now then, when you arrived at the accident, were these cars then in this position here that you have placed them here? A. Yes, sir.
Q. Would you tell us, did you find any glass or debris or wreckage from the collision of the cars, in your opinion, on the ground or on the pavement?
A. Yes, sir, I did.
Q. Were they on the ground or on the pavement?
A. They were on the, partially on the pavement and partially on the shoulder just to the east of the highway.
Q. To the east. What did you find off on the gravel to the east of the pavement in the way of debris?
A. Particles of broken glass and other debris that had been knocked from the vehicles.
Q. Now then if the cars -- you found these skid marks here, they were 66 feet long, were they not? A. Yes, sir.
Q. Now then, did the cars look like, at the time they hit here -- this car from the south hit the other car, didn't it, in the side, the Shelton car hit the Franklin car, didn't it, in the side? A. Yes, sir.
Q. That's the way you felt. Now then, Mr. Witness,
89] were the people already removed and gone to the hospital when you arrived? A. Yes, sir.
Q. Now did you find any witness to that accident other than Mr. Crawley, the one who has testified here and said he was driving a bus?
A. I found no other witness that said they actually saw the accident occur.
Q. Did you investigate the best you could to determine that fact? A. Yes, sir, I did.
Q. Did you talk to Cecil Crawley? A. Yes, sir.
Q. And where did you find Cecil Crawley when you talked to him? A. At the scene of the accident.
Q. At the scene of the accident. You got there at 1:50 and Cecil Crawley was still there? A. Yes, sir.
Q. Did he tell you that he was the only one that saw it? A. He didn't tell me he was the only one. I asked, in inquiring I asked who had seen the accident and it developed that he had seen the accident, so I took his

name as a person who had, and the only one.

Q. And he was still there and the bus was still there,
90] is that right?

A. Yes, sir.

Q. At 1:50, nearly 2:00 o'clock. I believe, Mr. Witness, if you would look at this, which purports to be a statement from the American Motors which is formerly Nash Automobile Company and Hudson Automobile Company, consolidated, dated August 31, 1956, giving a detailed report on the height of a Nash automobile, 1952, if the Court don't mind, I'd like to walk around here and show him that, if the Court please, to get about the height of this Nash automobile. This is just from the factory.

Now I want you to look here and tell us if you can, it's right in here --

Mr. Ogden: Do you have any objection to it?

Mr. Smith: May I take a look, your Honor? I don't know anything about it.

The Court: Yes, let him see it.

Mr. Ogden: Yes, sure. I found the place.

The Court: No, let him see it first.

Mr. Ogden: I was going to find the place I was going to let him see first, Judge. It's about the pistons and everything else and has nothing to do, if I can just get the part.

Do you have an objection to it?

Mr. Mountcastle: No.

91] By Mr. Ogden:

Q. Mr. Witness, just for your information, I will hand you what purports to be from the factory, the Nash, present Nash factory, with reference to the body type, the comparison of the 1952 Nash with reference to the height and all other general makes of cars, Ford, Lincoln, Cadillac and

all types, the length division, the height dimensions, the general definitions, and I will ask you to just take those and look them over and tell us, if you will, how much lower a Nash Rambler 1952 station wagon is or was than the Ford or other cars.

The Court: I don't think that's a proper way to get at that. If you have some information that's authentic, you ought to introduce it. You are handing him some figures there and telling him to make the difference.

Mr. Ogden: That's right, if your Honor please. Probably I didn't make that question right, the Court please. I beg your pardon. Doesn't make any difference. That would just be a matter of calculation.

By Mr. Ogden:

Q. I will ask you to look at that and refresh your memory, and tell the Court if in your opinion you are then, after looking at it, able to tell the Court about the height of a 1952 Rambler as compared with the Ford, one in which you sat the other day.

92] Mr. Smith: If the Court please, we don't want to take the time of the jury by objections and we are limiting them to just as few as possible, but we don't think this is the proper way to go about it.

As a matter of fact, we don't know where those sheets came from. We don't know anything about whether they are authentic or not, and we believe this is the improper way.

The Court: I will sustain the objection.

Mr. Ogden: If your Honor please, may I just make this statement? I was offering him as an expert.

The Court: No, no -- you can approach the bench if you want to tell the Court about it.

(The following out of the hearing of the jury)

Mr. Ogden: I might be wrong, Judge, but I thought

since he has opened it up that in connection with it I could cross examine him as an expert, whether or not that was correct.

The Court: Wait a minute. You just have some figures there. He doesn't know where you got them. Here is what you have to do: You have to go to some man from the factory that manufactures these things. Nobody has been sworn. You can't cross examine him.

Mr. Ogden: Could I ask him if he knew if that would be right?

93] The Court: No.

Mr. Ogden: At the proper time, since under my theory he is an expert, maybe?

The Court: No, here's the thing about it: You can ask him. Don't show him those figures because nobody knows. They can't examine the man to see whether those figures are correct or not.

Mr. Ogden: These are from the records from the factory.

The Court: No.

Mr. Ogden: I thought he was an expert, and it would be admissible.

The Court: No.

Mr. Ogden: I'd just ask him if he knows.

The Court: Don't compare those figures. You can ask him anything about it that he knows.

Mr. Ogden: Yes, sir.

(The following again in the hearing of the jury)

By Mr. Ogden:

Q. Now then, Mr. Witness, you have been in the highway patrol work for a good while, I believe you testified, and made different kinds of tests and things of that kind, and you have had occasion to observe all different types of cars, haven't you? A. Yes, sir.

Q. In your work as highway patrolman. Now then,
94] would you tell the Court from your experience whether or not, if you know, a Nash Rambler '52 automobile is lower, and if so how much lower to the ground than the other cars, the average car like a Ford?

A. I don't know, sir.

Q. You don't know. You never had occasion to study the height of cars and know nothing about that, is that right? A. I didn't measure a Rambler, no, sir.

Q. Well, I just asked you if you knew from all of your experience about which you testified.

The Court: He says he doesn't know.

By Mr. Ogden:

Q. All right, sir. You were subpoenaed here as a witness? A. Yes, sir.

Q. Over here to attend court, is that right, to appear and testify?

The Court: He says he was.

Mr. Ogden: I thought he said he wasn't.

The Court: You said you were subpoenaed, didn't you?

The Witness: Yes, sir, I was subpoenaed to court.

By Mr. Ogden:

Q. Now then, Mr. Witness, one question and I think I am through: Now then, observing from these skid marks here and where the other car, you found this debris and things of this kind, if Mr. Shelton had veered his
94-A] car to the west, as wide as that pavement was and as wide as all this, he could have easily missed this car,

had he had it under control, could he not?

A. If there was nothing else coming from the other direction he might have, yes, sir.

Q. In other words, this pavement was 20 feet wide. You testified to that. A. Yes, sir.

Q. Would you tell us whether or not there is any extension of this pavement with what I have called blacktop on either side, besides the pavement itself is 20 feet?

A. There is some material that is a rather hard surface. It's not considered a portion of the roadway, not considered a portion of the traveled part of the roadway. It's material that has been dumped in there by the Highway Department to fill holes that have been beat out along the edge of the concrete.

Q. Now would you tell the Court what is between the west side of the paving and the fence?

A. There is a sandy shoulder.

Q. All right, will you tell us whether the Highway Department has improved it by doing anything to it?

The Court: It doesn't make any difference about that.
95] It doesn't make any difference who improved it. If it's been done, it's been done, Judge.

Mr. Ogden: I just wanted to show that it was not a private driveway.

Judge, don't you think it makes any difference between a driveway and a public one?

The Court: Well, it doesn't make any difference whether it is or not.

By Mr. Ogden:

Q. Well, anyway, would you tell us whether or not it is improved -- you say it was in here. A. It was maintained by the Highway Department in that area.

Q. Thank you, sir. About how wide is it?

A. It's approximately 30 feet wide, I believe.

Q. Any bar ditches or construction there?

A. No.

Q. What about on the east side?

A. It's a little rougher on the east side. It's about

the same distance and about the same condition except that I don't believe it's quite as smooth.

Q. All right, sir. Is that true all along here, as shown on this plat here, clear out to these buildings?

A. It looks to be reasonably accurate.

Q. Yes, sir, looks to be reasonably accurate, and
96] it's about the same on both sides, no bar ditches, and would you tell -- sir? A. Yes.

Q. Would you tell, in going from the highway to this place here, the Chicken in the Rough, this garage here and these buildings here, can you just drive from the highway up to them? A. Yes, sir, you can.

Mr. Ogden: Just all leveled off. That's all, your Honor.

Redirect Examination by Mr. Smith:

Q. Mr. Williams, just one other question, please, sir: From the study you have made of traffic regulations, automobiles, distances, speeds they travel, I will ask you if you know how far an automobile travels in one second at 40 miles per hour. A. Yes, sir.

Q. Would you tell the jury and the Court?

A. The automobile would travel approximately 59 feet per second.

Q. At 40 miles per hour?

A. At 40 miles per hour, yes, sir.

The Court: All right, anything else?

97] Recross Examination by Mr. Ogden:

Q. Let me ask you this question: Do you know how far it will take to travel 900 feet at that rate, about four, less than four seconds, wouldn't it?

A. Take longer than that, I believe.

Q. Sir -- well, whatever, anyway, 900 feet it would take -- how much now per second how fast?

A. It would be 59 feet a second at 40 miles per hour.

Q. At 45 miles per hour, the speed you estimated, how long would it take it? A. It would take him --

Q. (Interposing) How many seconds?

A. About 64 feet a second would be about what he would be traveling.

Q. 64 feet a second, 64 into 900, let's see, roughly -- that's just a matter of calculation. Could you just give us --

The Court: (Interposing) You can figure that out.

Mr. Ogden: Yes, sir, I can figure that out. I can't figure it out as quick so I'll just figure it out later, Judge.

The Court: All right, step down.

98] PERRY HEWITT, called as a witness on behalf of the plaintiffs, testified as follows:

Direct Examination by Mr. Mountcastle.

Q. Doctor, I wish you would talk so these gentlemen at the far end of the jury box can hear you, and I assume that if they can hear you, then the lady up at the front end and the other men can hear you. I am a little deaf myself, so if you will talk out loud, we will certainly appreciate it.

Where do you live, Doctor?

A. Muskogee.

Q. How long have you lived in Muskogee, approximately?

A. Since 1947.

Q. Yes, sir, and what is your occupation or profession?

A. Physician and surgeon.

Q. Do you have any specialty, Doctor?

A. Neurology and neurosurgery.

Q. I wish you would explain to the Court and myself, and members of the jury, who don't know what a neurologist is, what particular portion of the body that has to do with, and the surgeon, neurology surgeon, tell what that has to do with.

99] A. Well, neurology, of course, is the treatment of neurological diseases or diseases of the nervous system. Neurosurgery is surgery of the nervous system, the head and the spine.

Q. And that includes the brain?

A. That's right.

Q. I wish you would give me, Doctor, something of your qualifications for the purpose of the record, where you graduated and what post-graduate work have you had, and interneship.

A. Graduated from the University of Oklahoma, and I had four and a half years post-graduate work at McGill University at Montreal Neurological Institute.

The Court: Can you gentlemen hear him back there? If you can, Doctor, speak a little louder. This air conditioning thing here makes it hard to hear, if you can talk a little louder we would appreciate it.

A. (The Witness) Following that I was in the Army until 1947. Since that time I have practiced.

Q. How long were you in the Army?

A. From 1940 until 1947.

Q. And what interneship have you had other than that in Canada? A. I took all of my training in Canada.

Q. All of your training in Canada. Where were you 100] located in the Army, what base hospital or --

A. I was with a neurosurgical team with an auxiliary surgical group.

Q. What troops were you with originally in World War II?

A. I was in the British Army for a little over a year.

Q. Then after the American Army entered the war, did you transfer to it? A. Yes, sir.

Q. Or did you still stay in the British Army?

A. Transferred in 1942.

Q. And what was your business there, I mean what did you specialize in, any particular?

A. Neurology and neurosurgery primarily.

Q. Could you tell us how many or estimate how many cases you have handled since you had your interneship?

A. I don't think I could answer it.

Q. All right, sir. Now I wish you would tell me, have you ever had occasion to examine Larry A. Shelton?

A. I have.

Q. Was he sent to you at my request for the purpose of examination? A. That's right.

Q. And so you could testify with reference to it here?

A. That's right.

101] Q. Did you have before you, or read before you examined him, the report of Dr. Glenn Cherry who operated on this boy? A. I did.

Q. Will you tell the Court and jury first the history, and then your examination and what your final diagnosis and prognosis is, please, sir?

A. This child was in an automobile accident the 3rd of July, 1955.

Mr. Ogden: Your Honor please, we object to him stating while he was on the stand what he was told.

The Court: Well, overruled. Go ahead, Doctor.

A. (The Witness) At this time he sustained a compound comminuted depressed fracture of the skull.

By Mr. Mountcastle:

Q. Now Doctor, just a minute: Will you tell the Court and jury and myself what comminuted means?

A. Shattered, fragmented.

Q. All right, continue. A. Depressed fracture of the skull in the left parietal area, that's the crown of the head right in this area. (Indicating)

Q. Yes, sir. A. He was given first aid at Ardmore, and the seriousness of the injury was recognized and he was immediately transferred to Dr. Cherry at Baylor Hospital in Dallas, who operated upon the injury, elevated the depressed fracture and removed fragments of bone from
102] the left parietal lobe.

Q. Will you talk a little louder, please?

A. The child did well after surgery and five days later was --

The Court: (Interposing) Maybe you had better cut that air off a little bit for the Doctor.

A. (Continuing) The child did well following the surgery, and five days later was transferred to his family doctor at his home town. He apparently had a smooth convalescence other than the fact that headaches have persisted. These headaches occur two or three times a week. He usually has them in the latter part of the day or evening.

He complains some of dizziness, and when asked to explain what he means by dizziness, he had some trouble making clear to me what the dizziness meant to him.

His father volunteered the information that the child was prone to lurch to the right when he stood up and started to walk. On direct questioning, his father states that the child has not done so well in school as prior to the injury.

Again on direct questioning, he stated that this was not related to any one --

Mr. Ogden: (Interposing) If your Honor please, may I make myself clear and let the record show I object to all the statements that the father made to this doctor as to the child's condition.

103] The Court: Yes, I will sustain that objection.

Ladies and gentlemen of the jury, you will not regard that statement. That would be hearsay.

All right, proceed, Doctor.

By Mr. Mountcastle:

Q. Just leave out those statements if you will.
A. Well, to me they were rather important.
Q. I know it is to a doctor, but how old is the boy, Doctor? A. Nine.

Mr. Mountcastle: He was a child, your Honor, and we think that's the only way the doctor can get at it.

The Court: Well, I can't break the rule. Go ahead. Just have to disregard those statements.

A. (The Witness) It was recommended by Dr. Cherry that the child would be, it would be wise for the child to refrain from any activity.

Mr. Ogden: I believe I'll object to what was recommended by Dr. Cherry. He says he received a letter from Dr. Cherry.

The Court: Sustained as to that.

By Mr. Mountcastle:

Q. Let me ask you, Doctor: What would your recommendation be with reference to refraining from sports, football, things of that nature?

A. I would recommend that he forego them.

104] Q. Continue, please.

A. His family feel that he is thinking --

The Court: (Interposing) Disregard that, ladies and gentlemen of the jury, about what his family thinks. We have to have your opinion, Doctor.

The Witness: I haven't come to that yet.

The Court: Well, you will have to come to it because you can't state what other folks --

By Mr. Mountcastle:

Q. Doctor, let's go down to your examination and tell the Court and jury what you found after careful examination of the boy, and what examination you made; if you made any x-rays, tell the jury about that, if you did.

A. Examination of the child revealed a well developed, stocky white male of 9, who is perhaps slightly large for his years.

His gait and station are normal. He is able to do heel and toe walking well. Coordination is good, muscle power is fairly good although perhaps not as good as one would expect of a child of this size.

Facial expression, face is rather inexpressive.

Q. What is that indicative of, Doctor--does that have any connection with his brain injury?

A. Well, there is very little emotional play, on con-

105] versation, or anything, or facial expressions. He is cooperative, but slow in his responses.

Q. What does that indicate, Doctor, his being slow in making response to calculations and simple calculations?

A. Well, it would seem to me that his comprehension is not as acute as one would expect.

Q. All right, thank you, sir. A. Palpation of his skull reveals a defect in the bone in the left parietal area that is about two and a half inches in length and about a half or three-quarters of an inch in width, on palpation.

Q. Now "on palpation", what do you mean by that?

A. Feeling of it.

Q. Let me ask you this, if I may at this time: What would you say with reference to this area being more sensitive than any other, other portions of the body with reference to convulsions?

A. This injury was right over the motor area. By motor area, I mean the portion of the brain that controls movements.

Q. Arms and legs? A. That's right, the entire body. On examining his cranial nerves, these were all within normal limits. His deep reflexes were symmetrical and perhaps slightly hypo-active, superficial reflexes were normal, patient's responses are slow but adequate and accurate. He is able to perform simple problems in arithmetic, although slowly.

106] It is my impression from the examining and history that he is somewhat unstable emotionally. There is history of some degree, at least --

Mr. Ogden: (Interposing) If the Court pleases, we wish to object to that.

Mr. Mountcastle: Well, I just don't know what he is going to say, your Honor.

Mr. Ogden: I believe information given him by the other people, parents, would not be competent.

Mr. Mountcastle: Well, I'm not sure that is the history that was given.

The Court: Well, you know what it is there, don't you?

Mr. Mountcastle: No, I'm not sure I do, your Honor.

The Court: Well, you ask him what it's going to be.

By Mr. Mountcastle:

Q. Is this going to be something that someone told you?

The Court: Wait just a minute now. Go over there and whisper to him and find out.

All right, go ahead.

A. (The Witness) In summarizing, this child has had a severe injury to the head and brain with a compound comminuted depressed fracture and laceration of the brain.

At the present time there have been no convulsive epi-
107] sodes, although that still remains a distinct possibility.

It is my impression that about 25 to 30% of patients with an open injury to the brain have convulsive episodes at some time during their life. It is possible that at some time in the future this defect, if it remains troublesome, it would be wise to consider a plate.

In considering the location of this injury, it is surprising that more neurological episode is not evident.

By Mr. Mountcastle:

Q. Doctor, what can you expect -- is there any particular time which you could say that he would not suffer from convulsive seizures, in the passing of time?

A. You can only generalize on that.

Q. Yes, sir; from your experience in treating other cases what is it, sir?

A. In my experience, which is rather limited, from the duration of time, they may occur anywhere from at the time of the injury to eight to ten years following. It may go many years longer than that before any convulsions occur. Most of them that have them will have them in the first twelve to eighteen months.

Q. Is it uncommon to have an injury like this, to have

an atrophy or shrinking or wasting of the brain tissues?

A. It is not uncommon, no.

Q. By that you mean it does frequently happen?

108] A. That's right.

Mr. Mountcastle: I think that's all on this boy, that I want to ask him; and I don't know whether you want to let Judge Ogden cross examine him, but then there is another witness that he is going to testify about, concerning.

Mr. Ogden: I don't think it makes any difference. He can go ahead and examine them both and we can cross examine them both.

The Court: All right, go ahead.

By Mr. Mountcastle:

Q. Now I wish you would tell me, Doctor, whether or not you had occasion to examine John D. Shelton, and if so, I wish you would state when, what his age was, and you did examine him at my request, for the purpose of this testimony?

A. That's right.

Q. All right, sir.

A. J. D. Shelton was in the same accident as the patient above, and at this time he sustained a severe laceration of the right forehead, approximately four inches in length, which necessitated 30-odd sutures.

Mr. Ogden: Your Honor, we make the same objection to what somebody told him.

The Court: Well, this is the history of the case. Go ahead, Doctor.

109] By Mr. Mountcastle:

Q. You have read the testimony of the doctors who operated on him, the deposition in Dallas, have you not?

A. That's right, I have that deposition.

Also, he sustained a severe comminuted fracture of the left humerus, the upper bone of the arm, that was supercondular in nature. It was extremely badly comminuted and

necessitated surgery.

An open reduction was done, and as a result of this he was hospitalized and considerable of the bony fragments were removed during surgery.

Q. Now just a minute: Will you explain to me and to the jurors who don't know?

The Court: Well, just leave all that off now.

By Mr. Mountcastle:

Q. Super-condular, what do you mean by that?
A. Just above the elbow, right at the elbow joint.
Q. And suture, what do you mean by that?
A. Stitches.
Q. I see there is a word "spicule" down there. What does that mean? A. Sharp pointed fragments.
Q. All right, continue, Doctor.
A. Patient volunteered the information that even up to the present time, occasional spicules of bone work out through the skin. In the same accident, he sustained an injury to his lumbo-sacral back. That's the small of
110] the back. As a result of this, he has had constant discomfort in his back and has had pain in his left leg extending down into the foot on the outside.

This pain is of a burning, severe nature that seems to be, as he describes, close to the bone. This pain is accentuated upon coughing or sneezing or any lifting. It is noted that there is considerable loss of motion in his back, and this varies from time to time, as to the severity of his pain.

He also complains of burning pain in the mid-line between the shoulders. This has been called to the attention of other doctors.

Examination of Mr. Shelton reveals that he is a fairly well developed slender <u>while</u> male of stated age who is not ill. It is noted that patient is unable to extend his left arm, and this lacks about 45 degrees of having normal extension.

Q. Will you illustrate, Doctor, to the jury, what

that would be on your arm, your left arm?

A. Normal extension is when the arm is out straight. His arm is at an angle about like that, and he cannot get it straighter.

Q. All right, continue, please, sir.

111] A. He has from this position about 15 degrees of flexion, that's up this way. (Indicating)

There is constant discomfort and tenderness about the left elbow on palpation.

There is a healed scar three inches in length on the lower third of the medial surface of the right humerus, and one about two inches in length on the dorsal surface of the upper portion of the elbow joint.

Patient walked, carries his left shoulder much higher than the right, and with the left arm held rigidly at his side. Held rigidly -- it should be from his side with the arm at an angle of about 45 degrees at the elbow.

There is a slight thoracic kyphosis, by that I mean stoop shouldered.

There is marked muscle spasm in the back muscles in the lumbo-sacral area, more marked upon the right.

There is considerable loss of muscle tone generally, but much more pronounced in the left thigh and lower leg.

Measurement of the left calf revealed to be about one-half inch smaller than the right. The left foot is colder than the right.

His deep reflexes were symmetrical, with the exception of the left ankle jerk which is depressed as compared, very markedly as compared with the right.

There is a sensory defect across the portion of the
112] foot which is compatible to the nerve root irritation between the fourth and fifth lumbar vertebra.

There is an area of hypesthesia in the saddle area on the left, which would be from the sacral nerves, as to two,

three, and four.

Q. What is hypesthesia, Doctor?

A. Diminution of sensation, not lost but depressed.

He has a tendency to give to the left leg as he walks. Dorsi-flexion is very weak in the left foot.

The thighs were flexed on the abdomen without any marked discomfort. On straight leg raising the right leg comes up to 90 degrees without discomfort, the left to about 40 degrees, when he has severe pain in the lumbo-sacral region.

Q. Would you explain to the jury what you mean by 40 degrees? A. With him lying flat on the back, bending the leg up as high as the patient will permit. Normally both legs should come up to a right angle with the patient in a prone position, a supine position.

In this instance, the man's right leg came up normally. The left leg came up to an angle of about 40 degrees, and he resisted any further movement, painful to him in his back.

Dorsi-flexion of the foot increased his pain.

Pressure over the jugular veins caused the left leg to feel numb.

Q. What is the significance of that, Doctor, if any?

113] A. By increasing the pressure within the spinal canal, it caused the symptoms to be increased, is what it amounted to.

Q. Now go ahead. I want to ask you one question before you get to the diagnosis.

A. There's a well healed scar on his forehead approximately three and a half to four inches in length. He tells me that it is quite tender and he is unable to wear a hat due to the tenderness in the scar.

Q. Now Doctor, from your examination and your x-rays and everything, is the complaint which he gives you in general typical and consistent with the injuries that he received?

A. I feel that it is.

Q. Give us your diagnosis now.

A. First is the healed laceration of the forehead; second is the healed comminuted fracture of the left elbow. That is fixed. The elbow is fixed. He lacks about 45 degrees

being able to extend the arm, has about 15 degrees of flexion.

Three, this man has signs and symptoms which are compatible with the diagnosis of a ruptured intervertebral disc.

Q. Tell the jury if you will, Doctor, what you mean by ruptured intervertebral disc.

A. The disc is a piece of tissue rather like gristle that is between each two vertebra.

Q. Is that your spinal column?

114] A. That's right, the vertebra are the spinal column.

At times, due to an accident or trauma -- it may be very varied in its nature -- this disc will slip backward into the spinal canal, where it will impinge upon the nerve root that is leaving the spine at that level, and this usually, if it's in the lower back, it will cause what we call sciatica.

Q. Is that painful or not? A. Painful and disabling to a varying degree, depending upon the severity.

It was my feeling that this man has sustained a high degree of partial permanent disability as a result of these injuries.

Q. Now Doctor, what do you say about the testimony that you got from the deposition of the doctor in Dallas who operated on him, and his condition last December, and the condition that you found him in when you examined him Saturday?

It shows that he had this for a period of over fourteen months, and what do you say with reference to whether it's reasonable to anticipate any further improvement or not?

Mr. Ogden: If your Honor please, may I object?

The Court: I'll sustain the objection as to what the other doctors said, and what they say. We will hear the prognosis from the doctor.

Doctor, you can tell what your idea is about the man's future, and what his condition is at the present time, but not based upon what somebody else has said.

115] By Mr. Mountcastle:

Q. What is your opinion from your examination?

A. My feeling would be that as concerns the arm, that his period of convalescence or expected improvement is about at an end, that there is not much reason to anticipate a marked improvement.

Q. Now let me direct your attention, Doctor, if I may: There has been some statement by Judge Ogden and there may be some testimony -- we are anticipating this, Judge, a little bit, but I don't want to bring the doctor back -- did he give you a history of having a tooth extracted in March, 1955, about three months before the accident, and sent to a hospital for treatment for that?

I wish you would comment on that if you have an opinion about that.

A. Well, from the history, again I have to quote from the history, that's my only knowledge about it, would be that he probably had a cerebral embolism.

Q. What is that, Doctor, please, sir?

A. That is a small fragment of tissue or blood that has clotted, that broke away from its original site and landed in the brain.

Q. Yes, sir. A. And as a result of that he had a mild, right-sided paralysis.

Q. Yes, sir.

116] A. But there is no evidence of it at this time, no residual, and the patient tells me that he cleared up very promptly.

Q. Then you think that with that history that he gave you and if he could show that he went back to work shortly after that, and didn't have this accident until July of that year, that had nothing to do with the accident or his recovery since the accident, this tooth extraction?

A. I would not feel there was any connection.

Q. Now Doctor, now assuming this man is 43 years of age and he has no education beyond a common eighth grade school, and the only vocational training he had was that of a barber: Let me ask you this, can he at this time in this condition do manual labor on the farm or something like that?

A. No.

Q. Is he at this time able to do, to follow his occupation successfully as a barber? A. Well, I would

certainly say that it would be extremely limited.

Q. And in a competitive age, would you say that he could not successfully carry on that trade?

A. Again I would say in a very limited way if at all.

Mr. Mountcastle: You may cross examine.

* * * * *

117] Cross Examination by Mr. Ogden:

Q. Doctor, what is a centimeter, how big is that?

A. Oh, there's about two and a half centimeters to an inch.

Q. A centimeter, that's pronounced centimeter, now that's about two and a half to the inch, Doctor.

Now then, Doctor, you have said cerebral, you used the words "cerebral embolism", and I believe you stated that Mr. Shelton told you that sometime in March, 1955 prior to this accident in July of 1955 that he had a numbness, is that what he told you he had?

A. Weakness and numbness.

Q. Weakness and numbness. Did he tell you where that weakness and numbness was? A. Yes, on the right side.

Q. Now giving you that information, Doctor, what in
118] your opinion would be your diagnosis of his condition at that time?

A. That he had had a cerebral embolism.

Q. And that that had affected the brain, you mean had gotten to the brain? A. It affected temporarily.

Q. Yes, to the brain. Now will that also, cerebral hemorrhage or embolism, you said, will that affect the nervous system also?

A. Yes, that's what it affected.

Q. Yes. Now would you tell us, Doctor, whether or not that will tend to cause a person to be numb and lose control of his movement, normal movement?

A. It may for the time being.

Q. Now did he tell you how long he stayed in the hospital then, and at what hospital he stayed in in March, 1955, before the accident in July? A. I don't know that I know what hospital. I know the doctor who saw him.

Q. What doctor was it? A. Dr. D'Errico.

Q. Dr. D'Errico in Dallas, is that right? A. Yes.

Q. Did he tell you, advise you the patient, Mr. Shelton, how long he stayed in the hospital at that time he was treated? A. Just a few days.

Q. A few days. Now Doctor, with reference to a disc, 119] may I ask you if I am correct, just to use the layman's language briefly, that between the joints, we'll just say the backbone instead of the vertebra like that, something like this (Indicating) -- the spinal cord is in the middle, and fluid all around it, isn't that right?

A. That's right.

Q. There in between those is what a layman might say a washer, you call it a disc, something that keeps the bone from being on the bone, isn't that right? A. Yes.

Q. Now sometimes those discs get moved over one way or the other and get against some nerve and pinch, and cause a person to suffer some disability from it, isn't that right?

A. That's right.

Q. Then they can be operated and can be changed, cured up by different methods, isn't that correct, Doctor?

A. That's right.

Q. Doctor, may I ask you further this one question and I think I am through: That it's difficult for any doctor to understand or know what might cause one of those situations, isn't that correct, what might have caused it; in other words, the position I am standing in now might cause it, mightn't it?

A. It might precipitate it. I don't think it would 120] cause it.

Q. And I will ask you, to reach up like that might cause or bring it about? A. Again, it might precipitate it. I don't think it would cause it.

Q. In other words, that's just a matter that you can't attribute to any particular one thing unless you knew what happened at a certain time, isn't that right?

A. That's right.

Q. And then when you have that, I will ask you, Doctor, if it isn't a fact that when you have a slipping of that little washer between the backbone, we'll use very rough layman's language, and it does impinge a nerve, of course that makes the part of the body there, the leg or whatever it is, numb, does it not, until you get off that nerve?

A. It's disabling in a varying degree.

Q. And he told you he did have numbness before this accident.

Now Doctor, may I ask you also, if a blood clot gets into the blood stream, and that's what you think happened in his case, do you not?

A. That's right. Well, for which?

Q. Well, I thought you said he had a tooth pulled, and you thought a blood clot got into the blood stream.

A. Yes, that caused a weakness on the right side.

121] Q. Now Doctor, I'll ask you if sometimes even to get a blood clot out of there, either has to be dissolved or cut off a leg or something to get it out, don't you?

A. What are we talking about?

Q. The blood clot. Pardon me, Doctor. Am I correct or was I mistaken about that?

A. Well, I'm not certain whether you are talking about the disc or the cerebral embolism.

Q. I understood you to say that he had a cerebral embolism, and that that was, in ordinary language, a blood clot in the blood stream. Am I right about that, and it went to the brain?

A. It had lodged in a vessel in the brain.

Q. All right. Now Doctor, what I am asking you about now, how do you get those blood clots out of the system?

A. If they are not too big, they are absorbed.

Q. And if they are too big to absorb, what happens then, how do you get them out?

A. They may have some permanent damage.

Q. Well, it will stay there, don't they, in the blood system, in the blood stream?

A. If they are absorbed, they are removed.

Q. I know, but if they don't absorb, they just always remain there and are apt to cause damage at any time, aren't they?

122] A. They have already caused the damage.

Q. Well, do they cause it again?

A. It's possible.

Q. In other words, when you get anything floating in the blood stream, going down that vein there, till you get that either out of there or absorb it or something, something is done to it, it may cause some damage here to the brain now; in other words, if it's up here it might hit the heart and cause a heart attack, and possibly kill a person, mightn't it? A. It's possible.

Q. So till you get that out of there, it's apt to keep on causing trouble, isn't it? A. It's possible.

Q. And Doctor, I'll ask you if one of the remedies for that, described and recognized, I say remedies, a lot of times you cut a man's leg off while the blood clot is down in it, don't they, try to keep from cutting the whole leg off; you have seen that, haven't you, trying to get rid of it?

A. Well, it's very, very unusual.

Q. Well, you have seen it, haven't you? A. Yes.

Q. I believe, Doctor, this is my last question: Doctor, you did examine this young man, you said, I believe I am correct, this is written here -- that you said he was large for his age or something to that effect, did you not?

123] A. That was my impression.

Q. That was your impression of it. And when was that they brought him up here to Muskogee?

A. 8th of September.

Q. 8th of September? Did they tell you they would return him to Texas; is he here now, do you know?

A. I don't know.

Redirect Examination by Mr. Mountcastle:

Q. Just one more question, your Honor: I wish you would state for the Court and jury whether or not these blood clots or whatever happens in a concussion or when anything gets in the brain, is quite frequent that they are absorbed and you don't have any further reaction.

Mr. Ogden: Object to that as leading, if your Honor please.

By Mr. Mountcastle:

Q. Is it or is it not?

The Court: All right, overruled, go ahead.

The Witness: Would you repeat it, please?

The Court: Well, put it on that basis.

By Mr. Mountcastle:

Q. I said, isn't it, or is it not a frequent occur-

124] rence that you find in your practice that when one

of these, for example, the arm gets numb or something and you discover a clot in the blood stream, that with rest, frequently that disappears and you don't have any further reaction? A. They may be transient.

Q. And isn't that frequent that they --

Mr. Ogden: (Interposing) We object to that as leading.

By Mr. Mountcastle:

Q. Is it or is it not a frequent occurrence?

A. It's not uncommon.

Q. It's not uncommon. State whether or not that in your opinion if in five or six days he is able to go back to his work and has no further trouble from April 4, 1955 till July 2, 1955, whether or not that is a complete recovery.

Mr. Ogden: Now if the Court please, that's objected to.

The Court: Overruled. Go ahead.

A. (The Witness) I would feel that he had made a good recovery.

Mr. Mountcastle: That's all.

Recross Examination by Mr. Ogden:

Q. Well, of course, Doctor, what I tell you or what a patient tells you about whether they made a recovery and didn't have any trouble, or did have, that's just what
125] he claims, isn't that right? A. That's right.

Q. And you just relied upon what he told you. Now what is that called in medical terms, what symptoms, or non-symptoms -- if I tell you something or a patient tells you something -- subjective and --

A. (Interposing) Objective.

Q. Objective -- what kind would that be, if he just told you something? A. Well, that would be hearsay.

Q. That would be hearsay, so that's all you was going by as to whether he had had any more trouble or not, is that right? A. That's right.

Q. That would just be hearsay, you didn't know whether he did or didn't, you didn't even know whether he was having any difficulty when he started up here to Oklahoma or not, did you?

A. No, I just know there is no evidence of it now.

Mr. Ogden: That's all.

Mr. Mountcastle: That's all.

The Court: You want the doctor to be excused?

(Witness withdraws, and by agreement of the parties is excused.)

126] Mr. Mountcastle: If the Court please, we are now offering portions of the deposition taken in Ardmore, Oklahoma on the 6th of September, 1956. Judge Ogden was present.

The Court: All right, proceed.

Mr. Mountcastle: Now if your Honor please, offer the deposition of P. M. McNeill, M.D., taken at Oklahoma City on the 6th of September, 1956, on the part of the Defendant, but on cross examination we'd like to introduce our cross examination of that doctor because he examined one of the plaintiffs in this case.

The Court: All right.

Mr. Mountcastle: With your permission, I will ask the questions and Mr. Smith will recite the answers.

I will omit the name of the lawyer -- it was Mr. Withington, member of the Oklahoma City bar, did the cross examining. This is cross examination:

"Q. The mother stated that the child was in a wreck and sustained an injury to his chest. Now, what did you gather from your examination to be the injury to the chest?

"A. The injury was to the chest wall, to the ribs, that is the sixth and seventh ribs on the left side, on his

left chest wall were fractured, and they have healed together at this time and of course this is some, oh, ten months following the injury, the date of the accident. Healing takes place for fractured ribs in about six to eight weeks.

"Q. You mentioned a hole in the pleura or chest wall
127] that permitted air to escape? A. Well, at the time of the accident, the ribs punctured the lung and when they punctured the lung, the lung collapsed and that is why they put the tube in, so as to let the air out until the rent in the lung was healed over, which it would do in a period of about two to three weeks. Then the air is reabsorbed and the lung expands and is perfectly normal again.

"Q. I see. And so he doesn't have a collapsed lung now? A. No, he has no collapsed lung at all. That is all healed.

"Q. There was evidence of a stab wound that you mentioned? A. That is the scar where the doctor placed the tube. We call it a stab wound because it is a very small, maybe a half inch, incision made with a knife directly between the ribs and the tube is inserted at that point
128] and so he had one in front and one in the back made by the surgeon.

"Q. I see. Now, then, the mother stated to you that the child ate fairly well but seemed to be nervous and irritable and cries at night. Did you find anything that would cause that in your examination? A. The boy was very complacent in my office and cooperated 100 per cent. For a three-year-old he did remarkably well. There was no evidence of any nervousness and his reflexes were all normal, which means that his nervous system was not injured. She merely stated that. I gave that as history; I didn't observe that.

"Q. Well, that is what I wanted to know, whether you did observe that or didn't? A. No, that was her history. He was very complacent.

"Q. That was part of the history? A. Yes, sir.

"Q. I believe that is all."

That's all of the cross. Do you want to read the redirect examination?

129] Mr. Ogden: Pardon me. I just think it would be better for you to read in the proper order, keeping

everything in the proper sequence.

Mr. Mountcastle: All right, now I'll read the recross:

"Q. Of course, she didn't give you a history of his weight at the time of the accident, according to the history that I have here. Is that right? A. She didn't know his weight. She just knew his birth weight.

"Q. She told you that was 10 pounds and that he gained normally until the accident occurred? A. That is right, but she couldn't give me the figures as to what his weight was at the time of the accident. I merely had to take the standard weights and measures of all children.

"Q. But as far as you know, he may have weighed the 44 pounds at the time of the accident?

"A. That is right.

"Q. Neither one of you apparently knew his weight at the time of the accident? A. I didn't know it.

"Q. You just assumed that he had gained some in your statement here to the Court -- (Interrupted)

"A. I didn't say that he had gained weight or hadn't gained weight. I merely stated what his weight was.

"Q. I understood you to say that he had gained in
130] weight, which was evidence of no malnutrition?

"A. No, I beg your pardon, I wouldn't want to -- (Interrupted)

"Q. Well, I want to see if I am getting you right on it.

"A. I will state this, that if he weighed more than he should weigh ten months following the accident, that he couldn't have lost to any great degree or he wouldn't have been as much larger proportionately than his weight should have been for a child of that age.

"Q. Yes, but really, as far as you know and as far as the history was, he might have weighed the 44 pounds at the time of the accident? A. That could have been. That could be true."

We now offer the text of the deposition that I have read.

Mr. Ogden: No objection.

The Court: All right, let it be admitted.

Mr. Mountcastle: If the Court please, and ladies and gentlemen of the jury, we now offer in evidence the deposition of Dr. Glenn Cherry, adduced by the plaintiff on the 29th day of February, 1956, before a notary public in Dallas County, Texas, in the Medical Arts Building, and I will omit the stipulation and the agreement of the attorneys.

131] Mr. Ogden: That's agreeable with me.

Mr. Mountcastle: And start with the direct examination by Mr. Smith.

"Q. What is your name? A. Dr. Glenn Cherry.
"Q. What age a man are you? A. 36.
"Q. Where do you live? A. Home address?
"Q. Yes, sir.
"A. 4247 Somerville, Dallas, Texas.
"Q. What school or schools are you a graduate of if any, please, sir? A. I graduated from Southwestern Medical College in 1945, and took my post graduate training at the University of Michigan at Ann Arbor, Michigan.
"Q. Are you, what occupation or profession are you a member of? A. Regular MD.
"Q. Regular MD? Doctor, would you relate to us the course, or courses of study and training that you had preparatory to the practice of medicine?
"A. Prior to the, you mean, medical education?
"Q. Yes, sir.
132] "A. And also premed? I took my premedical education three and a half years at North Texas State College, you want the years?
"Q. Yes, sir. If you can remember them?
"A. 1937 to '40. I have failed to mention that I attended Baylor University Hospital, and finished at Southwestern Medical College in '45. I interned at Parkland Hospital in 1945 and '6, Dallas, Texas, general practice two years, and four years of training in general surgery, neurology, and neurosurgery, at the University of Michigan Hospital completed in 1953.
"Q. Doctor, do you specialize in any branch of medicine?
"A. Yes, neurological surgery.
"Q. All right, sir, are you a member of any boards or societies, if so, relate them?
"A. Member of the Dallas County, Texas State, and

American Medical Association.

"Q. Are you a licensed practitioner of medicine in the State of Texas? A. Yes.

"Q. And when were you licensed? A. October, 1945.

"Q. And what, have you been continuously since then, 133] so licensed? A. Yes, I was while I was in Michigan, I had to have a Michigan license, of course, but I have been licensed since that time.

"Q. All right, sir, now, do you maintain office for the practice of your profession? A. Yes.

"Q. Where, please, sir?

"A. 909 Medical Arts Building, Dallas, Texas.

"Q. Doctor, have you ever professionaly seen Larry Shelton? A. Yes, sir.

"Q. When did you first see him professionally, please, sir, for an injury he claimed to have sustained in an automobile accident in Oklahoma? A. July 3rd, 1955.

"Q. Doctor, did you receive a history of some injury received by that boy from him or his mother or father?

"A. The history was taken from the boy as well as the mother and the father.

"Q. All right, sir, did you examine him at that time, or diagnose the pain from your examination which you did, or what condition was he in at that time? Just, you may refer to any notes you may have made? A. He was brought into the emergency room at Baylor Hospital, after making a plane trip from Ardmore, Oklahoma. I saw him shortly after arrival at the emergency room at Baylor. At that time he had an obvious skull fracture laceration and skull fracture in the left parietal area.

"Q. Where is that for the purpose of the Court and the jury, so they may understand in layman's language, Doctor?

"A. It is, the laceration was about two inches behind the hairline on the left side and about one and one half inches from the midline.

"Q. All right, sir, now, proceed and tell us what you did; did you treat him? A. Yes, sir.

"Q. Go ahead with your examination or treatment, and relate to us, please, sir? A. He was somewhat drowsy, and from the examination he had an obvious depressed skull fracture, that is after the wound was examined he was taken to surgery immediately and the described area was operated on and several bone fragments were removed from the brain tissue itself, by this, I mean that the bone fragments were driven

down into brain substance. These fragments were removed. Bleeding was controlled and the wound was cleansed in
135] the usual manner. Postoperatively, he did very well so far as any complications were concerned. Immediate postoperative --

"Q. (Interposing) Doctor, may I interrupt, and ask you to explain a little more in detail and layman's language, about the operation consisted of, what you did when you operated on his head? A. We extended the incision, opened it up more, exposed the brain, of course, the bone fragments were driven down into the brain substance. All bleeding was controlled; as always bleeding on these depressed fractures of this type, the bleeding was controlled. The bone fragments were removed, and the torn covers of the brain were sutured back in place.

"Q. Now, what do you mean by sutured back in place for the purpose of the record, Court, and Jury?

"A. Sewing back together.

"Q. All right, sir, now, Doctor, where was that operation performed at that time?

"A. Baylor University Hospital, Dallas, Texas.

"Q. That was on the 3rd of July, 1955?

"A. Yes, sir.

"Q. What condition was the boy in when you first saw
136] him that day with respect to whether he was conscious or not? A. He was conscious when I saw him.

"Q. All right, sir, did he appear to be in pain?

"A. Yes, sir.

"Q. Suffering?

"A. Yes, sir. He did have pain.

"Q. All right, sir, do you recall how long the boy was in the hospital here at Baylor?

"A. He was kept in the hospital until July 8th, 1955.

"Q. All right, sir, now, --

"A. I would like to add that he was transferred to the care of his physician of Sulphur Springs, that is the reason that I let him go that early.

"Q. Now, Doctor, would you relate, please, sir, the times you have seen him and treatments and examinations, since he was released from the hospital here in Dallas?

"A. I have seen him on several occasions since that time. The last being yesterday.

"Q. All right, sir, did you do an examination on him?
137] "A. Yes, I did.

"Q. All right, sir, would you tell us please, sir, the results of that examination in detail as much as possible?

"A. The history revealed, the patient complained of headaches, some dizziness and some instability in walking. I did a complete neurological examination and this revealed that the wound was healed very well, although there is still a bone defect in the area described previously. The entire neurological examination did not reveal any evidence of a blood clot or anything of that nature at that time.

"Q. All right, sir, Doctor, these headaches which you have testified of, what significance would that have?

"A. These are very hard to evaluate from an objective standpoint, my opinion is that they will probably clear with time, although I can't say how long it will be.

"Q. What age is this boy? I forgot to ask you that?"

"A. Eight years old.

"Q. Eight years of age? All right, sir, the lack of stability in walking, which you have testified to, what significance do you attach to that?"

138] Mr. Ogden: We object to that, if your Honor please. It's hearsay.

The Court: Read the question again, please.

Mr. Mountcastle: The question is:

"All right, sir, the lack of stability in walking, which you have testified to, what significance do you attach to that?"

The Court: Well, overruled.

Mr. Smith: (Reading)

"Will you repeat that question over?

"Q. Yes, the fact of his instability in walking and getting around which you have testified to here from your examination here yesterday, what significance do you attach to that. A. I don't believe it is significant at the present time, because I could find nothing in the examination that would make me think that that was secondary to a neurological deficit.

"Q. I see, now, Doctor, the boy's condition when you

first saw him and examined him, considering that and considering the operation and the various types of treatment, do you, in your professional opinion, think that this boy is now able to play and get about in athletics as any other normal child his age would be? A. I have advised them not to let him participate in rough sports, such as
139] football for this reason, he might receive another blow to his head, for at least a period of a year or 18 months after his operation, and he would do well at that time to be examined again.

"Q. What in your opinion would be the result of another blow on his head? A. Well, if he had another blow to the head, or another severe head injury, I should say it may complicate it, we would have to determine what should be done and so forth.

"Q. All right, now, the condition that his head and skull is in now, by virtue of this injury of which he sustained on the 3rd of July, is he more susceptible of injury now than he would be if he hadn't sustained that injury?

"A. There is a small bone defect there in the area described, and naturally if he was to receive a blow to this area where the bone is absent, he would, of course, be susceptible to an injury there.

"Q. All right, sir, Doctor, in this boy's case, considering the operation you performed on him, and the various stages of treatment, are you reasonably able at this time to express a professional opinion, your professional opinion, as to what effect that injury will have on
140] this boy in days ahead? A. It is impossible to predict accurately the probabilities of cases of that nature.

"Q. All right, sir. A. Quite frequently they do develop a convulsive disorder, or a type of epilepsy following such injuries and it is possible for atrophy, or degeneration to show up at a later date as a result of the injury.

"Q. Do I understand you then that he might appear normal now, as of yesterday, and then epilepsy might show up at a later date? A. Yes, that is my opinion, yes.

"Q. All right, sir."

(It was agreed that Mr. Howard might read the questions on cross examination.)

(Reading)

"Q. Doctor, of course, it is actually true, is it not, that any child or even adults might develop epilepsy, isn't that right? A. Sure.

"Q. Anyone might have it? In other words, there is no way to tell whether this boy or any other boy had, whether he had the injury or not, it is difficult to
141] tell, is that correct?

"A. I am sorry, will you ask that again?

"Q. Dr. Cherry, I said there is no way to tell whether this boy or any other boy would have epilepsy in the future, there is no way to determine that, is there?

"A. No, sir.

"Q. And actually, you did an excellent job in raising this depressed skull, did you not? A piece of bone there was pushed in, is that what happened, the skull was pressed down? A. Several fragments of bone were pushed down into the brain.

"Q. And you removed those? A. Yes, sir.

"Q. Now, Doctor, the brain, of course, starting with what covers the outside, the skin, and then the skull, and then this other cover to the brain, is there not?

"A. Yes, sir.

"Q. Would you name how many different covers, starting with the skin on the head, and down?

"A. The epidermis, the corium or true skin, subcutaneous tissue, and galea, g-a-l-e-a bone, and dura arachnoid, pardon me, that should be dura mater, m-a-t-e-r, arachnoid mater, and pia, p-i-a mater, m-a-t-e-r.

"Q. Now, Doctor, do you know Dr. Harry Wilkins, and Dr. Hermann, and Dr. Rix in Oklahoma City, who are also neurosurgeons? A. I know of them.
142] "Q. They are outstanding neurosurgeons, and so considered there? A. I remember them as such, yes.

"Q. Now, then, Doctor, will you --

"Dr. Cherry: (interposing) Excuse me just a minute. I don't mean to interrupt.

"Q. (continuing) Doctor, what is CM, what does that mean in your report? A. Centimeters.

"Q. Now, could you tell the Jury in inches, how big a centimeter is, or how long it is?

"A. 2.5, approximately, centimeters per inch.

"Q. It is what, how much? A. One inch.

"Q. Is it exactly an inch, a centimeter, or do you know without looking it up? A. No, it's 2.5 something, I don't remember the points, but it is something of that nature.

"Q. Of an inch.

143] "A. No, each 2.5 centimeters is equal to one inch.

"Q. Well, it would take, now, let me just see, two and a half centimeters to an inch? A. Uh-huh.

"Q. So, this term, I wasn't familiar with, and I was just trying to find out. When you say a depressed skull fracture, you mean by that, do you not, Doctor, that the skull is fractured and pushed down? A. Yes, sir.

"Q. What is a funduscopic examination, Doctor?

"A. That is an eye examination where we look into the eye with an ophthalmoscope, and look at the retina, and optic nerve.

"Q. Now, Doctor, isn't it to determine whether or not there has been any damage or injury to the brain after an injury of any kind, isn't that what the examination is for?

"A. It usually isn't in an acute injury, pressure of long standing, several days, usually have some swelling of the nerve in the eye, but usually of no importance unless they are acute.

"Q. Then on the funduscopic examination, or the eye
144] examination, all means the same thing, how did that, when you checked him over, how did that check out?

"A. It was normal.

"Q. Normal? A. Yes, sir.

"Q. Then, wouldn't that be an indication to you, Doctor, that there was no damage to the brain?

"A. No, sir. That doesn't mean one thing so far as I'm concerned. That doesn't mean anything so far as damage to the brain is concerned.

"Q. Well, what is the purpose of making the examination, what significance does it have, Doctor?

"A. It is part of the neurological examination, and it may show early swelling.

"Q. I see, then it usually does not, but sometimes? Do you mean, in this report here which I have, I am sure you have a copy in your file, you said that the pupils were regular and equal, and reacted to light, at least there was no damage to the brain sufficient to affect the eye or sight,

was there, Doctor, is that correct?

"A. According to the examination at that time, yes.

"Q. Yes, sir. Doctor, what does in that report, do
145] you have a copy of it, Doctor?

"A. I suppose this is the same one.

"Q. I am sure it is."

Mr. Ogden: We had just as well omit that there, the conversation between the counsel and the other lawyer.

Mr. Howard: (Reading, continuing)

"Q. All right, then, Doctor, I am about one, two, three, four, I am about in the middle of paragraph four all EOM were full without n-y-s-t-a-g-m-u-s, now, what did that mean, Doctor? A. All the stray ocular movements that is movement of the eyes, were full. That is, he had no limitation in the movement of his eyes, and there was no jerking movement, and nystagmus means jerking motion.

"Q. No jerking movement to the eyes, and there is no limitation? A. Uh-huh.

"Q. Now, there was no facial a-s-y-m-m-e-t-r-y, will you explain that to the Court and Jury, please, sir?

"A. By this, I mean there was no evidence of facial paralysis.

"Q. Now, then, the hearing was grossly normal bilaterally, what does that mean, Doctor?"

146] Mr. Ogden: If you will pardon me, Judge Howard, I will read those questions and answers, if you'd like me to.

The Court: All right.

Mr. Ogden: (Reading)

"A. His hearing or talking and listening, without the more involved forms of testing at the time was all right; it was normal on each side.

"Q. Yes, sir. Now, the palate rose and median line, and his voice was normal. Now, what significance does that have, Doctor? A. To me, it means that there was no paralysis of the nerve to the throat or voice box.

"Q. Now, if the 11th cranial nerve is intact, by that, what do you mean?

"A. That there was no damage to the 11th cranial nerve.

"Q. All right, sir, Doctor, would you for the benefit of the Jury would you, pardon me for going into detail, but you see, they just won't know what that means. Will you tell what significance that has, and what is the 11th cranial nerve, please, sir?

"A. It is one of the nerves that comes off at the base of the brain, supplies muscles in the neck and shoulder.

"Q. Yes, sir? A. And the reason we check for this
147] is to see, if there is any damage in that area, it helps us to locate the damage.

"Q. And there was no damage, is that right?

"A. No, sir.

"Q. To this nerve? The tongue was protruded in the midline, and there was no evidence of atrophy or fasciculation, I guess it is, what does that mean, Doctor?

"A. That the examination of the tongue was normal.

"Q. Now, in the neckline you have modalities, how do you pronounce that? A. Modalities of sensation.

"Q. Were intact throughout. Now, would you explain to the Jury in ordinary language, so they will understand what you found there, what they meant?

"A. Light touch, pin prick, vibratory sensation, and deep pain.

"Q. Yes, were present throughout the body? Now, the examination was of the motor system did not reveal of localized weaknesses or f-a-s-c-i-c-u-l-a-t-i-o-n-s, now, then, would you explain to us what that means?

"A. It means that I could find no paralysis in the
148] arm or legs.

"Q. The motor system, in a layman's language, what does that refer to, Doctor?

"A. Generally speaking the motor system is referred to the part of the nervous system that goes to the muscles that moves the muscles of the extremities.

"Q. There was no cerebroma signs, what does that mean?

"A. Cerebellum is the part of the brain at the base of the brain, the portion of the brain at the base, and this was checked for a certain size to rule out the possibility of injury to this area. I did not find any there.

"Q. You didn't find anything wrong there? Now, the reflexes were active, and equal, and there was no pathological reflexes, that means everything was normal, Doctor?

"A. Yes, sir.

"Q. All right, sir, now, there was no evidence of meninges irritation, will you explain to the Court and Jury, please, Doctor, clearly what that means?

"A. Unusual stiffness of the neck, and there is often the layman will connect this with meningitis, although, massive amounts of blood in the cerebro spinal fluid also
149] gives similar symptoms.

"Q. And there was no evidence of irritation there, was there? A. No, sir.

"Q. That was a good sign, was it not?

"A. Well, it doesn't necessarily mean one thing any way or the other, it is part of the examination, naturally, but it can be either positive or negative, and we do that primarily for the follow up, of course, in these cases.

"Q. Well, you made a very thorough examination of the boy, didn't you, Doctor?

"A. That is my opinion; I did.

"Q. Yes, sir. Did you consider, Doctor, that the operation that you performed was a success?

"A. Yes, sir.

"Q. And Doctor, is it not a fact that any neurosurgeon, as you have, on numerous occasions removed as much bone as you removed in this case on many patients in these type of operations on them just alone, in other words, the bone was a very small amount, was it not?

"A. Would you ask that again, please?

"Q. Well, Doctor, so that it -- in other words, the
150] bone that you removed was a very small amount of bone, was it not?

"A. What do you mean by small amount?

"Q. Well, now, on any operation, you remove that much bone and don't even put it back in many instances, in other words, that is not significant, is it, Doctor?

"A. It is significant to that area.

"Q. In other words, if he doesn't get a blow to that area, it won't be significant, isn't that correct? That was the point I would like to bring out.

"(Off the record discussion.)

"Q. (continuing) And Doctor, when you examined this boy here yesterday, who brought him here, do you recall who was with him?

"A. His mother and father brought him hereyesterday.

"Q. Now, then, when you examined him, you didn't find anything from your examination of him that would indicate that he would have any difficulty or be bothered in walking or have any headaches, or anything else, did you?

"A. I would like to add that a neurological examination is purely an objective examination, and a patient can have pain, and it not show up in the neurological ex-
151] amination.

"Q. Well, yes, I realize, Doctor, that there is no way for a doctor or anyone else to x-ray pain. There is no way to pick that up. Now, that is what is called a subjective symptom, is just what the patient tells you, is that right? A. Yes, sir.

"Q. Now, whether that is true or false, the doctor doesn't know, except just take a patient's word for it, or not take it, isn't that right? A. That's right.

"Q. Then, the doctor makes an examination and he looks for objective symptoms, isn't that correct?

"A. That's right.

"Q. You found no objective symptoms to support that, did you, Doctor?

"A. The neurological examination was negative, yes, sir.

"Q. Well, would your answer then to my question then be that you did not find any objective symptoms to support those complained of? A. No, sir.

"Q. You did not? Fine, I think I will be through in
152] just a moment, Doctor. Now, you only kept the boy here, I believe, in the hospital from July 3rd to July 8th? A. Yes, sir.

"Q. And would you tell the Court and Jury whether or not he walked out of the hospital or had to be carried out, if you know? A. I don't remember, but I think, it is my understanding that he was taken out to the car on a stretcher.

"Q. You were not there? A. No, sir.

"Q. You wouldn't know then? A. No, sir.

"Q. That was on the 8th day of July, then when did you see him again, Doctor? The next time after the 8th of July? A. August 22nd.

"Q. Now, on August 22nd, did you see him, Doctor?

"A. Yes, in this office.

"Q. And how did he seem to be getting along?

"A. Examination at that time was negative.

"Q. Was negative? When you tell the Court and Jury that the examination on August 8th, is that the date?

"A. 22nd.

153] "Q. On August 22nd, was negative, that meant that he was, you found nothing wrong, is that right?

"A. I mean by that, I could find no evidence of a blood clot or any abnormality other than his previous injury.

"Q. Was he getting along all right, Doctor, in your opinion then on August 22nd?

"A. I certainly think, as well as you could expect.

"Q. As well as you could expect? You didn't treat him then, did you Doctor? A. No, sir.

"Q. And you have not treated him professionally or any other way since he left the hospital on July 8th?

"A. Nothing other than the checkup examination.

"Q. Well, I mean treat him though, you haven't treated him? A. No, sir.

"Q. You have not, and you have seen him on August 22nd, and then yesterday was the next time? A. Yes, sir.

"Q. So, since he left the hospital on July 8th, last

154] year, you saw him on August 22nd, 1955, at which time you just checked him over, and didn't treat him, and found that he was getting along all right. Then he came back here yesterday with his mother and father and you checked him over again yesterday, and from an objective standpoint he seemed to be doing fine, didn't he, Doctor?

"A. Yes, sir.

"Q. Is that correct? A. Yes, sir.

"Q. Now, Doctor, there is nothing you said in your testimony here that you told there, not to, you said not to play football, or anything of that kind for about a year, but, there is no reason why he couldn't go ahead and lead an ordinary and normal, things like going to school, and working around the yard, and doing anything of that kind? In other words, you don't want him to do anything where he might fall and hit that particular spot on something, is that right?

"A. Well, certainly a blow to the head should be avoided.

"Q. And Doctor, your opinion as a medical doctor, and as a neurosurgeon here in Dallas, if this boy goes along through life in a normal ordinary way, do you know of any reason why he won't be able to get along all right and

155] live a normal life? A. If he doesn't develop the complications mentioned previously.

"Q. Well, of course, Doctor, you say if he doesn't develop any complications, of course, you have heretofore testified that anyone might develop those complications, isn't that right? A. Yes, but I think anyone that has received an injury like his, is more likely to develop them than the average person.

"Q. What injury are you talking about?

"A. The scar tissue where those bone fragments were driven down into the brain.

"Q. Now, then, Doctor, what causes it where you haven't had an injury of that kind, and don't have any scar tissue? A. Well, there are numerous causes for epilepsy, injuries, clotting, scarring, and numerous causes we are unable to determine.

"Q. In other words, there is just many many things that cause a person to have epilepsy?

"A. It is possible.

"Q. The boy doesn't show any signs of having it, does he? A. Not at the present time.

"Q. No, sir, and whether he does or does not would
156] just be, in other words, that is just more or less, you say he might or might not, there is no way for anyone to even form a sound opinion as to whether he will or will not, is that right, Doctor?

"A. All I can say is, as I have previously testified, anyone with an injury such as this is more prone to have it than anyone without an injury.

"Q. Yes, sir. Now, Doctor, may I ask you, you have practiced as a neurosurgeon since 1953 here in Dallas, have you not? A. Yes, sir.

"Q. And do you know Dr. D'Errico? A. Yes, sir.

"Mr. Ogden: I think that's all."

Then redirect examination.

Mr. Montcastle: (Reading)

"Q. Dr. Cherry, you may have defined it earlier, but I overlooked it if you did, for the purpose of the Court and the Jury, in layman's language what do you mean by the term neurosurgery?"

(Answers read by Mr. Smith, with Mr. Mountcastle

reading the questions.)

"A. Surgery of the central nervous system, which in-
157] cludes the brain, the spinal cord and peripheral nerves which are nerves in the body, and extremities as a whole.

"Q. All right, sir, now, Doctor, in layman's language, what do you mean by epilepsy?

"A. Convulsive disorders, sometimes referred to by laymen as fits.

"Q. All right, sir, now, knowing this boy's condition as you do, having operated on his head and removed that skull from his brain, is it your professional opinion that if this boy should receive a blow on the head in the future that it might result in his permanent disability?

"A. It is impossible for me to answer that, too many factors there.

"Q. All right, sir, Doctor, could you tell us what your subjective findings were yesterday when you examined this boy? You have been asked about the objective findings, by Mr. Ogden, and I thought I would like for you to include your subjective."

Mr. Mountcastle: Do you want to make an objection?

Mr. Ogden: I want to object to it on the ground that what somebody told him would not be competent.

The Court: Well, overruled. Go ahead.

158] Mr. Smith: (Reading)

"A. Well, the subject, I find, as described previously, the headaches, dizziness, and instability in walking.

"Q. All right, sir, I overlooked your answer. I remember your answer again now. I believe that's all, Doctor."

Mr. Ogden: (Reading)

"Q. Now, Doctor, so we will have it in the record, I hate to go over it again, but when you say subjective findings, that just means actually, in ordinary layman's language, that is just what they told me, the boy and his

parents told you, isn't that right?

"A. The subjective findings include the history, and the examination, part of any examination, including a neurological examination depends on the patient's answers.

"Q. Yes, and when you say subjective, that just means what the patient told you, isn't that right?

"A. That's right.

"Q. So, consequently, when you asked the question, then you just meant, to tell him in ordinary language, that is what he told you, isn't that right, and that is all there is to that? A. Yes.

"Q. And too, the parents were with the child at that
159] time, isn't that right? A. Yes, sir.

"Q. And were they here when you talked to the child in the room here with him?

"A. Yes, sir. They were.

"Q. The parents stayed right here with him.

"A. Yes, sir."

Mr. Ogden: I make an objection to that as incompetent.

The Court: Well, overruled.

Mr. Ogden: Then by me on recross.

(Reading)

"Q. Doctor, I want to ask you and read from this report at the bottom of the first page, following the operation. "The patient did very well, and he was kept in the hospital until July 8th, 1955. By the second hospital day, his fever had returned to normal and he never did develop any localizing neurological signs." Now, then, what would you say that that meant, that he never did develop any localizing neurological signs, what did that mean?

"A. It is the general accepted term that we use, it meant that he did not develop a blood clot, and the operation --

160] "Q. (interposing) 'At the time of discharge from the hospital the patient was feeling very well, and a neurological examination showed he was within normal limits,' does that mean he was getting along good, Doctor?

"A. It means very satisfactory.

"Q. Very satisfactory. Doctor, will you tell the

Court whether or not it is possible or impossible to tell whether or not this boy or any other person will or will not have any epilepsy or mental disturbances on account of an injury of this type?

"A. I think you are asking about three questions.

"Q. I think I am too, Doctor, will you just read that over to him and let's see, maybe I can ask it --

"A. (interposing) I am not trying to be --

"Q. (interposing) I know you are not, Doctor, I am getting a lot of these things confused. Will you read that back to him, please, Mr. Reporter?

"A. Could you break that down for me?

"Q. Well, well, I will just ask you is it possible for you to tell whether or not he will or will not have?

"A. It is possible, but I can't predict it with ac-

161] curacy one way or the other.

"Q. Well, there is not any way that you know of? Anybody else know whether he will or will not have?

"A. No, sir.

"Q. And on the whole, if a person has an injury, and a successful operation as this boy had here, and has responded as well as this boy has responded, it would be your opinion that he would not have any future trouble, or had you rather not -- A. I would say that because they can develop epilepsy 10 or 15 years or even longer just from the scar tissue.

"Q. I understand, but it is your opinion that he would not, isn't it, Doctor? A. I cannot answer that. I don't know if he will or will not.

"Q. You just can't answer? A. No, sir."

Mr. Mountcastle: I object to that, your Honor, that next question.

Mr. Ogden: Well, I won't read that if you had rather I wouldn't.

Mr. Mountcastle: We offer the part of the deposition as read.

162] The Court: All right, let it be admitted.

Mr. Ogden: We offer the cross examination.

The Court: All right, let it be admitted.

Mr. Mountcastle: Next offer in evidence, your Honor, deposition of Dr. George Truett James. That's a deposition of 86 pages. I don't know whether your Honor has something set for 4:30 and whether you would want to start on it.

This is the deposition, if the Court please, of Dr. George Truett James on behalf of the plaintiff, on the 29th day of February, at Dallas, Texas, by agreement with Mr. Ogden.

I will omit the rest of the caption and start with the direct examination by Mr. Smith.

Mr. Ogden: That's agreeable with me.

Mr. Mountcastle: (Reading)

"Q. State your name, please, sir."

(Answers read by Mr. Smith)

"A. George Truett James, T-r-u-e-t-t.
"Q. How old a man are you? A. 37.
"Q. Where do you live? A. 4542 Belfort, Dallas.
"Q. Are you engaged in any occupation or vocation?
163] "A. In the practice of orthopedic surgery.
"Q. Will you define for us, please, sir, what the term orthopedic surgery means?
"A. This is a special branch of surgical practice that deals with the treatments of diseases, congenital, anomalous injuries, to the muscular, skeletal system. This muscular skeletal system deals with the bone, joints, muscles, and ligaments.
"Q. Are you a graduate of any school or schools preparatory to the study and practice rather, of orthopedic surgery? If so, would you relate them to us, please, sir?
"A. I am a graduate of the Baylor Medical College.
"Q. Would you tell us what other schools that you have attended, or that you have graduated from, that is pre-study or pre-medical work you had?
"A. Pre-medical work was at the University of Alabama.

"Q. All right, sir, now, will you tell us of any special training that you had preparatory to the practice of orthopedic surgery, if any, Doctor?

"A. Yes, sir. I had an interneship at Baylor Hospital, followed by residency in orthopedic surgery at Baylor Hospital.

164] "Q. Is that here in Dallas?

"A. That is here in Dallas.

"Q. All right, sir. A. Followed by a residency in crippled childrens work at the Texas Scottish Rite Crippled Childrens Hospital here in Dallas; subsequently by a residency in fracture work at the City-County Hospital of Dallas, known as Parkland.

"Q. All right, sir, are you a member of any Board or Society, Doctor? A. Yes, sir. I am a member of the Dallas County Medical Society, and the State Medical Society, and the State Orthopedic Association, and the American Medical Society, and the American Board of Orthopedic Surgery, and the American Academy of Orthopedic Surgery.

"Q. And Doctor, you referred then in your answer, to the State, did you mean the State of Texas?

"A. Yes, sir.

"Q. All right, sir, now, how long have you been engaged in your profession, that is since you have been licensed to practice medicine; you were in the State of Texas -- I will get to that in a minute, it is a matter of preliminary which we have to cover with you doctors. Excuse me, one second, please, sir.

165] "(Off the record discussion.)

"Mr. Smith: Would you strike the last question, and let me clarify it, Mr. Reporter?

"Q. (continuing) Doctor, are you duly licensed to practice medicine in the State of Texas?

"A. Yes, sir, I am.

"Q. And how long have you been so licensed?

"A. Since 1944.

"Q. Has that been continuous since that date?

"A. Yes, sir.

"Q. All right, sir, now, do you maintain offices for the practice of your profession?

"A. Yes, sir. I do.

"Q. Where, please, sir?
"A. 3701 Maple, in Dallas.
"Q. Are you connected with any clinic?
"A. Yes, sir. I practice in a group of orthopedic surgeons, known as W. B. Carrell Clinic.
"Q. All right, sir, now Doctor, you realize, do you, that you are rendering your deposition here this morning, and that this may be used in court in the trial of the case that it deals with, do you not? A. Yes, sir. I do.
"Q. And do you realize that here in your presence, 166] while this deposition is being taken --"

Mr. Ogden: We object to that, think it's incompetent, irrelevant.

The Court: Read it again. I couldn't hear it.

Mr. Mountcastle: (Reading)

"And do you realize that here in your presence while this deposition is being taken --"

Then Mr. Ogden made an objection.

The Court: I sustain the objection.

Mr. Mountcastle: (Reading)

"Q. Doctor, have you ever professionally seen J. D. Shelton, of Sulphur Springs, Texas?
"A. Yes, sir. I have seen him.
"Q. Will you tell us when you first saw him professionally, please, sir, and for what injury he claimed to have sustained if any? A. I first saw him on July 3rd, 1955 in the emergency room at Baylor Hospital, at which time he complained of pain in the left arm and across the forehead, and the face.
"Q. All right, sir, now, --"

Mr. Ogden made an objection.

Mr. Ogden: Go ahead.

Mr. Mountcastle: (Reading)

"A. In the nose and in the chin."

167] The Court: Now you are starting off on another issue here. I believe we will recess at this point.

* * * * *

168] Mr. Mountcastle: If the Court please, on yesterday, the Clerk tell us we read the cross examination of Dr. P. M. McNeill, taken in Oklahoma City September 6th, but we failed to get it properly identified and we now offer, if the Court please, the cross examination of Dr. McNeill and ask the Clerk to mark it.

The Court: All right.

Mr. Smith: That will be Plaintiffs' Exhibit No. 3, your Honor.

The Court: All right, let it be admitted.

Mr. Mountcastle: I make this statement to your Honor and to the jury:

Yesterday we started in on the deposition of Dr. Truett, George Truett James, the doctor at Dallas who examined and operated on J. D. Shelton, one of the plaintiffs in this case, and we had gotten through the doctor's qualifications when your Honor indicated it would take too long to finish.

169] With that explanation to the jury, we will not go through the formality of the doctor's qualifications.

(Mr. Mountcastle proceeds with the reading of the deposition of Dr. George Truett James, with Mr. Mountcastle reading the questions and Mr. Smith reading the answers.)

"Q. What is the date? A. July 3rd.

"Q. July 3rd. All right, sir, now, did you receive a history of some injury received by him at that time?

"A. I received the history from the patient, that he had been injured in an automobile accident near Ardmore,

Oklahoma, in which he, his wife, and four children were injured, and that he had received emergency treatment in Ardmore, Oklahoma, and was then flown to Dallas by private plane.

"Q. Now, Doctor, did you examine him or diagnose his pain from your examination of him? A. We examined him in the emergency room; the patient was having considerable pain, which he limited primarily to the elbow region of the left arm.

"Q. All right, now, will you relate to us, please, sir, your findings, and incidentally, you may refer to any notes, that you might have made at the time, pertaining to the complaints, and injuries? A. When the patient
170] was first seen, he was wearing a bandage that bound the left arm to the body, which had been applied over his clothing; there was a laceration of the forehead extending across diagonally from right to left, measuring approximately four inches, which had previously been sutured. There was a laceration just beneath the nostrils of the nose which had not been sutured. There was a laceration of the chin which was not sutured.

"Q. Doctor, may I interrupt, please, sir, for the purpose of the Court and Jury, will you tell us what you mean by lacerations and the other word suture, please, sir?

"A. Yes, sir. A laceration means a break in the skin, in this particular instance, a deep cut. Suture, means to sew together.

"Q. All right, sir, go ahead, read your testimony.

"A. The bandaging was removed from him, from his arm, and relief of pain following a preparation of the skin, Novocain was injected into the injured area in the upper arm at the elbow site. This allowed for more complete x-ray studies, which had not been completed until the arm could be moved, and these x-ray films are here.

171] "Q. All right, sir, I want to get to those in just a few minutes, Doctor. A. Following the x-ray examination, it was decided that the treatment would be in the form of the hanging cast method of treatment.

"Q. Would you explain that, please, sir?

"A. This is a method of treatment in which the arm is encased in a plaster cast from the armpit to the base of the fingers, and a sling is used, suspending the weight of the cast from the neck, it should be noted also that on the original examination, no definite nerve injury was

discovered; at the same time Novocain was injected into the wound at the base of the nose, and also in the chin, and stitches were taken in these wounds. The patient was then admitted to the hospital.

"Q. What hospital, Doctor? A. Baylor Hospital.

"Q. Here in Dallas? A. Here in Dallas, Texas, for observation and treatment. This treatment consisted of side arm traction, which means that the patient was placed on his back in bed, in his cast, and rope from the cast is passed through a pulley at the side of the bed to
172] maintain traction on the arm. This helps control muscle contracture, and shortening, and pain. The patient remained in his own traction for several days, and then was allowed to be ambulatory on the hospital floor.

"Q. What do you mean by ambulatory, Doctor, for the benefit of the Court and Jury? A. Allowed to walk about the room, and the floor in the hospital. His family doctor in Sulphur Springs was subsequently contacted, and the patient was referred to this doctor for follow up care, and it was agreed that we would treat him for six weeks."

Mr. Ogden: We will object to what he and some other doctor agreed to. I don't believe it will be competent.

The Court: Well, overruled.

Mr. Ogden: Exception.

(Reading continuing, Mr. Mountcastle reading the questions and Mr. Smith reading the answers.)

"A. For six weeks in a hanging plaster, which was then to be followed by an x-ray examination out of the cast.

"Q. Doctor, when you used the word or the term it was agreed, will you tell us whether that meant a decision on your part, as to what was to be done in the future six weeks period? A. May I answer?

173] "Mr. Smith: Yes, go ahead.

"A. The agreement was that the family physician would, in Sulphur Springs, take care of the patient's needs so far as drugs for pain, and that at the end of six weeks period, the patient would return to my office, for the cast change

and the x-ray examination."

Mr. Ogden: We will object to that next question, your Honor.

(There is a conference at the bench.)

The Court: Sustain the objection.

(Reading, continued; Mr. Mountcastle reading the questions and Mr. Smith reading the answers.)

"Q. Now, Doctor, do you have the date there that he was released or transferred from Baylor Hospital on that occasion? A. July the 8th.

"Q. Of what year, please, sir?

"A. Of 1955.

"Q. All right, sir, now, Doctor, let me ask you about the x-ray; did you, or not, in connection with your examination of J. D. Shelton take x-rays?

"A. Yes, sir. I did.

174] "Q. And were those x-rays made under your direction?

"A. Yes, sir. They were.

"Q. Did you make them yourself?

"A. No, sir. They were made in the x-ray department at Baylor Hospital at Dallas, Texas.

"Q. All right, sir, was the patient properly placed at the time of the taking of those x-rays?

"A. Yes, sir. He was.

"Q. And were the x-rays taken by standard medical technique, for taking x-rays?"

Mr. Ogden: We object to that on the ground the doctor didn't see the x-rays, had nothing to do with them.

Mr. Smith: He testified that they were made according to the standard technique.

Mr. Ogden: If you will look there at the deposition you will see what he said he didn't have anything to do with it.

The Court: I will overrule the objection.

Mr. Ogden: Exception.

The Court: Go ahead.

(Reading, continued. Mr. Mountcastle reading the questions and Mr. Smith reading the answers.)

"Q. And were the x-rays taken by standard medical technique, for taking x-rays?

"A. Yes, sir. They were..

175] "Q. Do you have those x-rays, pictures available, Doctor? A. Yes, here they are.

"Q. Will you take them one at a time, and tell us what each picture shows? A. These films show a comminuted, which means, many pieces fracture involving the left humerus, just above the elbow joint. Two separate views are noted.

"Q. Now, wait just one minute, Doctor, the picture to which you have been testifying from there, as you have been looking at it through the view box, may I ask you to hand that to the reporter and let him mark that as Plaintiff's Exhibit 1, so that we may have it available for the trial of this case, and then we will go to the next picture."

Mr. Mountcastle: There is an indication there that Plaintiff's Exhibit 1 was marked for identification.

Mr. Smith: May we have that offered now as Plaintiffs' Exhibit No. 7?

Mr. Ogden: If your Honor please, in order to save time, object to each one of these exhibits and let objection go to all of these for the reasons that I have stated heretofore, your Honor; then I won't have to make an objection to each one.

176] The Court: All right, let it be admitted.

(At this point, Exhibit 7 was placed in the view box.)

(Reading, continued. Mr. Mountcastle reading the questions and Mr. Smith reading the answers.)

"Q. All right, sir, now did you conclude your testimony

with respect to Plaintiff's Exhibit No. 1 which involves two pictures, I believe, Doctor, or did you have anything else that you wanted to say about Exhibit 1?

"A. Yes, sir. I think so.

"Q. All right, sir. A. This patient's films were made in the emergency room at Baylor Hospital; subsequent films after the cast had been applied were made with the cast showing about the fracture site, and these are elicited herewith.

"Q. All right, sir, Doctor, will you hand those pictures to the Court Reporter, in order that he may mark them as Plaintiff's Exhibit No. 2 for identification."

Mr. Smith: May we offer them as Exhibit No. 8, your Honor please?

The Court: All right.

177] (Reading, continued; Mr. Mountcastle reading the questions and Mr. Smith reading the answers.)

"A. Because of additional pain described in the right hand on the following day, July 4th, additional films were made of this hand, which were negative for evidence of fracture.

"Q. Do you want these too?"

(There is a brief discussion at the bench, Mr. Smith stating that there was an objection.)

Mr. Smith: (Reading)

"We will abandon, so far as we are concerned, the introduction of those films pertaining to the hand, as they are negatives, Doctor."

(Reading, continued; Mr. Mountcastle reading the questions and Mr. Smith reading the answers.)

"Q. Do you have any other pictures there pertaining to the broken arm that would add any information as to the condition of his arm at that time, Doctor?

"A. No, sir. I do not.

"Q. All right, sir, now, Doctor, did you, or not,

perform surgery on J. D. Shelton?

"A. Yes, sir. I did.

"Q. Will you tell us what you did and when, please, sir? A. The original surgery was in the emergency room, and consisted of suture of the wounds of the face. The second surgery that was done by me, was done upon the
178] left arm, October the 4th.

"Q. Is that 1955? A. 1955, at that time two separate incisions were made, one in front of the arm and one behind, just above the elbow joint through these incisions, sharp points of bone seen in the x-rays were removed, using a mallet, and chisel. At that time the radial nerve was found to be adherent in scar tissue and new bone formation. This was, this nerve was released from the scar, and transplanted anteriorly, and fixed in such a manner as to prevent additional scarrings about the nerve from new bone formation.

"Q. Where was that operation performed?

"A. That was done at Baylor Hospital.

"Q. Here in Dallas, Texas, is that right?

"A. Yes, sir. Dallas, Texas.

"Q. Now, Doctor, previous to that operation that is between the time of July 3rd, and in October, when you operated, do you have any record there of having seen this patient J. D. Shelton?

"A. Yes, sir. I saw him August 1, '55.

"Q. All right, sir? A. October 3, '55.

179] "Q. All right, sir. Now, on those two occasions did he complain of pain in any part of his body? If so, tell us."

Mr. Ogden: To which we object because it's self-serving.

The Court: Overruled.

Mr. Ogden: Exception.

(Reading, continued. Mr. Mountcastle reading the questions and Mr. Smith reading the answers.)

"A. So, on August 1st, '55, the patient was complaining of rather constant pain in the arm; x-rays were brought in. His cast was badly worn and not fitting well. Cast

was removed clinically, the arm was in good alignment. Ulnar nerve sensibility at the fracture site seemed quite good. The x-ray showed alingment satisfactory, except for one large fragment out of the lateral side of the lower end of the humerus tilted and penetrating the biceps region. It is anticipated, it was anticipated that he would get satisfactory union. Multiple fragment, and the fractured bone penetrating was to be removed at a later date. A new long arm cast was applied .

"Q. All right, sir. A. On October 3rd, '55, the patient is complaining of so much pain in the left arm that
he wanted to go ahead and have his surgery in the hope
180] that this will relieve some of his pain. This is the
note that was made at that time.

"Q. All right, sir. A. That he is also complaining of some low back pain, and numbness in his legs when he sits with his legs extended. He states that Dr. Stevens made examination of his back, which will be brought --"

Mr. Smith: Then we have an objection from Mr. Ogden.

Mr. Ogden: We objected to what Dr. Stevens stated.

The Court: Yes. What Dr. Stevens said shouldn't be admitted. Sustain the objection.

(Reading, continued; Mr. Mountcastle reading the questions and Mr. Smith reading the answers.)

"A. The examination in this office, the examination of, in the arm at this time showed he had gained some range of motion in flexion, which means bending of the arm, and in extension, which means straightening of the arm. He showed definite weakness in the power of separation of the fourth and fifth fingers, and there is a slight bit of numbness on the fifth finger, and up the under aspect of the forearm, suggestive of all the nerve irrtations, ulnar nerve irrita-
tions. The examination at that time showed rehealing
181] sufficient to advise the removal of bone property at
the fracture site which are binding the biceps and tricep muscles, sent to Baylor Hospital for that procedure.

"Q. Now, Doctor, let me go back and ask you one or two more questions about the operation which you have testified to. Do you have any pictures of, reflecting the

condition of the arm immediately preceding the operation?

"A. Yes, sir. I do.

"Q. All right, sir, will you produce them, please, sir, and those that are material, and tell us what they show?

"A. These films are dated 10-3-55, and they show in the side view of the arm that the fracture fragments have healed. Malalignment, with a sharp pointing spicule of bone extending to the front of the arm and one extending to the back of the arm, as I point here in the front view we can see considerable amounts of bone formation about the multiple fragment of the fracture.

"Q. All right, sir, now, Doctor, I would like for the court reporter to identify this as Plaintiff's Exhibit No. 3 for the record, please, sir."

182] Mr. Smith: That will be Plaintiffs' Exhibit No. 9.

Your Honor, may we read the last question and answer because it has reference to this picture?

The Court: All right.

(Reading, continued; Mr. Mountcastle reading the questions and Mr. Smith reading the answers.)

"Q. All right, sir, will you produce them, please, sir, and those that are material, and tell us what they show?

"A. These films are dated 10-3-55, and they show in the side view of the arm that the fracture fragments have healed. Malalignment, with a sharp pointing spicule of bone extending to the front of the arm and one extending to the back of the arm, as I point here in the front view we can see considerable amounts of bone formation about the multiple fragment of the fracture.

"Q. All right, sir, now, Doctor, I would like for the court reporter to identify this as Plaintiff's Exhibit No. 3 for the record, please, sir."

Mr. Mountcastle: And this is Plaintiffs' Exhibit 3, now Plaintiffs' Exhibit No. 9.

The Court: All right.

(Reading, continuing; Mr. Mountcastle reading the

questions and Mr. Smith reading the answers.)

"Q. And you have testified in regards -- let me ask
183] you another question about that Exhibit 3? You have testified that regarding that, regarding the end or point of the bones that extend out there on each side of the bone from that picture, can you tell us what you did in the operation? A. Yes, sir. I can better show you what was done on another x-ray."

Mr. Smith: May we have Plaintiffs' Exhibit No. 10.

Mr. Ogden: Same objection.

The Court: All right, overruled.

(Reading, continued; Mr. Mountcastle reading the questions and Mr. Smith reading the answers.)

"Q. All right, sir? A. I will try to find the immediate operative film dated 10-24-55.
"Q. All right, sir, and we will ask the court reporter to mark that picture as Plaintiffs Exhibit No. 4 for the record, please, sir."

Mr. Smith: For the record, please, sir, that is our Exhibit No. 10 which is on the view box.

(Reading, continued; Mr. Mountcastle reading the questions and Mr. Smith reading the answers.)

"Q. Now, proceed, Doctor. A. If you will notice this spicule that extended to the front of the arm has been removed.
"Q. You are pointing now to Exhibit 4?
184] "A. No. 4. Also the sharp one on the back of the arm in Exhibit No. 4 is now absent.
"Q. Now, did you remove those bones?
"A. By entering the arm through an incision down to bone, and with the use of a mallet and a bone chisel, and a bone biting instrument, these spicules of bone were removed.
"Q. All right, sir, now, Doctor, do you have any record there of how long Mr. J. D. Shelton was hospitalized as

a result of this operation, to which you have just testified?

"A. From two to three days, as I remember.

"Q. All right, sir, now, have you seen him since then?

"A. Yes, sir. I have.

"Q. I wish you would relate to us, please, sir, what treatment, if any, you administered to him since then, on what dates you have seen him, and generally for the information of the Court and Jury, how you have kept up with him since then, and the result of your checking him?

"A. On 10-24-55, he was seen, and he made the following statement that several days after his --"

Mr. Smith: And then I told him he couldn't relate
185] that, and then he went on:

(Reading, continued; Mr. Mountcastle and Mr. Smith reading as indicated.)

"A. Several days after the surgery the arm and hand felt definitely better. Now, he continued to have pain in the ulna, distribution of his hand on examination, there was numbness along the radial aspect, but he has good radial motor function; which means, muscle function at the wrist, the range of motion of the arm was now 90 degrees of bending, or flexion, and 120 degrees of extension, or straightening. The wounds were well healed.

"Q. Let me interrupt you there, Doctor, will you repeat the degrees there in the two instances? I didn't get those, I want to ask you some questions about them.

"A. 90 degrees of flexion, and 120 degrees of extension.

"Q. What, what do you mean by that, Doctor, in layman's language? A. I mean, that he was able to bend his elbow to a right angle, and he was able to straighten his elbow 30 degrees past a right angle.

"Q. All right, sir, now, did I interrupt you before you had finished bringing his treatment and examination down to date? Did I, if so, I would like for you to
186] continue? A. Yes, sir. At this time, he was advised to consult with Dr. Albert D'Errico, a neurosurgeon of Dallas who has previously seen this patient on an entirely separate medical problem in March of '55. The next time the patient was seen was December 22nd, and at that time he stated that he had been a patient, hospitalized

in the Veterans Hospital at McKinney, Texas, and had been advised."

Mr. Smith: And Mr. Ogden says,

"Now, we object to that."

Then I continue:

"A. That no additional surgery was indicated at that time."

Mr. Ogden: Your Honor, we move to strike that, if your Honor please, what he said he had been advised; whatever your Honor thinks about it.

The Court: Yes, what he had been advised by somebody else, sustain the objection to that. Disregard that statement.

(Reading, continued; Mr. Mountcastle reading the questions and Mr. Smith reading the answers.)

"A. He still complained of the pain in the arm and hand and stated it was getting worse."

187] Mr. Ogden: We move your Honor to strike that, what he said to the doctor.

The Court: Overruled.

(Reading, continued; as above indicated)

"Mr. Smith: That is what he told you, is it not, Doctor?

"A. Yes, sir. He now had at that date a 125 degrees of extension, and 90 degrees of flexion. He had 100 degrees, 100 percent of normal supination, which means, the power to turn the palm upward. He had only 50 percent of normal pronation, which means, the power to turn the palm downward. The strength in the hand had improved slightly; he had limitation in ability to move the entire arm from the shoulder as in placing the left hand on his head, or

behind his back. On x-ray, at that time, showed further evidence of bony union about the fracture site. He was again seen on February 7th, '56, and at that time he told me --"

Mr. Ogden: If your Honor please, that's the same objection I just made, about what he told him. I don't think that would be competent.

The Court: Well, I will overrule that. Go ahead.

(Reading, continued; Mr. Mountcastle reading the questions and Mr. Smith reading the answers.)

188] "Q. Doctor, go right ahead and finish telling us what he told you.

"A. -- of pain in the elbow, and upper arm, and a pulling sensation in the forearm when he attempted to raise his arm in a forward flexion, or abduction position. Now, this means as in putting the hand in the salute position.

"Will that clarify that for the Court, that position?

"He had numbness over the distribution of the radial side of the thumb and hand. He had 120 --

"Q. (interposing) Doctor, may I ask you what that indicated, that numbness?

"A. That indicated a decreased normal sensation due to decreased nerve function.

"Q. All right, sir.

"A. He had numbness over the, excuse me, he had 120 degrees of extension, and 87 degrees of flexion of the left elbow. At this time he had full supination, and full pronation, indicating an improvement in the range of motion of the forearm.

"Q. Had you noticed that there was very little improvement in the range of motion of the elbow?"

Mr. Ogden: Object to that as leading, your Honor.

189] The Court: Overruled.

(Reading, continued; Mr. Mountcastle reading the questions and Mr. Smith reading the answers.)

"Q. (continuing) Doctor, let me clear that up. Did you find any improvement, please, sir, when you examined him then over the previous examination?

"A. I found an improvement of two degrees of flexion.

"Q. All right, sir? A. The grip was fairly good. He stated again he was unable to use his arm or to tolerate physical therapy, because of the pain in the arm from the arm pit down to and including the left hand."

Mr. Ogden: Right there we move to strike that portion of the answer referring to what he stated.

The Court: Overruled.

(Reading, continued; Mr. Smith reading the answers and Mr. Mountcastle reading the questions.)

"A. It was my opinion at that time, the patient was making some slow progress, and that we were not justified in surgically removing the ulnar nerve at the elbow in view of the fact that the muscles of the hand were improving in their strength, and that the ulnar nerve at the elbow could be felt, and was not bound in scar.

"Q. Have you seen him since then, Doctor?

190] "A. Yes, sir. I did. I saw him 2-28-59.

"Q. That was yesterday, was it not?

"A. Yes, sir. At which time --"

Mr. Mountcastle: And then Judge Ogden says "you mean 1956, instead of 1959".

Mr. Ogden: If the Court please, I think that was in error, and should be '56 instead of '59.

Mr. Smith: Counsel well knows the next four questions clear it up.

The Court: All right.

Mr. Ogden: If it does, it's all right.

(Reading continued; Mr. Mountcastle reading the questions and Mr. Smith the answers.)

"Mr. Ogden: Pardon me, you mean 1956, instead of 1959, don't you?

"A. Yes, sir. Did I say 1959?

"Mr. Ogden: Yes, sir. You said '59.

"A. (continuing) I beg your pardon, that's February 29th, 1956. Yes, sir, thank you for calling my attention to the error. Yesterday, Mr. Shelton's range of motion of his elbow was the same as previously stated at his last visit on February 7th, '56.

"Q. All right, Doctor? A. He complained of -- of pain in the region between his shoulder blades and on examination, a tenderness in this area was noted.

191] "Q. All right, sir?

"A. On further examination it was noted that he carried his arm in a flexed position at his elbow.

"Q. What do you mean by flexed position?

"A. Bent position, excuse me, for the use of that term.

"Q. Go right ahead, Doctor. A. In testing him it was noted that he was unable to place his left hand in his back pocket, in unbuttoning his shirt it was noted that he could unbutton the buttons below the waist and up to the third from the top button on the shirt, but was unable to button the top three buttons of the shirt.

"Q. All right, Doctor, now, let me ask you this question? Assuming that Mr. J. D. Shelton was 42 years old at the time of his alleged injury on or about the 3rd of July, 1955, and that up until that time he had been actively engaged in the vocation of a barber, which necessitated the use of his hands, both hands, and both arms in cutting people's hair, and shaving them, and in your opinion of Mr. Shelton, considering the condition he was in on or about July 3rd, 1955, when you first saw him and examined

192] him, further considering the various treatments and surgery which you have performed on him, and as well, the various times when you have examined him, up to and including yesterday, in your professional opinion, Doctor, is he capable as of yesterday, of doing barbering work, which includes the use of both hands and arms?

"A. I do not think so.

"Q. All right, sir, now, I will ask you this further question, Doctor, considering the fact that you saw him

on the various dates that you have testified and administered to him the various treatments and operations and considering all of that, including the examination you gave him on yesterday, and based upon the knowledge you have of his condition, by virtue of all of that in your opinion, will he ever be able to follow the barbering profession again, which requires him to use his hands and arms?

"Wait a minute, hands, and arms, and that is that profession?"

Mr. Ogden: Your Honor please, I object to that on the grounds it is incompetent, irrelevant, and immaterial, and the further grounds that it's assuming a fact that is not in evidence.

193] The Court: Overruled.

(Reading, continued; Mr. Smith reading the answers and Mr. Mountcastle reading the questions.)

"A. I don't believe so.
"Q. All right, sir, Doctor, have you in your records an account of the total amount of services, charges for services rendered to Mr. J. D. Shelton, since July 3rd, of 1955, that date?
"A. I have only the charges made for, from my office.
"Q. All right, sir?
"A. I do not have his hospital bills, or --
"Q. All right, sir?
"A. Or the bill from Dr. D'Errico, or Dr. Stevens.
"Q. All right, sir, I am asking you only about yours, Doctor. A. Yes, sir. I do.
"Q. What would you say is the reasonable value of the services rendered to J. D. Shelton to date?
"A. Here is a copy, a duplicate of the entire charge, including x-rays, drugs, and professional services.
"Q. All right, sir, will you tell us the total of it to date, please, sir?
"A. I don't have the total, but I have his outstanding account, the balance left on it is $287.50.
194] "Q. Now, I am asking about the total charges, and we will wait, if you want to have the girl total it.
"A. I can add it here in just a minute. $468 even.

"Q. $468 even? All right, sir, will you excuse me?
"A. Yes.
"Q. I would like for you to hand that to the reporter, and let him mark it Plaintiff's Exhibit No. 5 for the record, please, sir."

Mr. Smith: May we offer it as Plaintiffs' Exhibit No. 11.

(Reading, continued; Mr. Mountcastle reading the questions and Mr. Smith the answers.)

"Q. You have made some mention in your testimony, a while ago, there was a balance due of so much on that account. Do you mean by that, he has paid some of that?
"A. Yes, sir. He has paid some $170.50.
"Q. All right, Doctor, let me ask you this one further question about this last examination you gave Mr. Shelton on yesterday; did you detect or find any
195] marked improvement over the last examination you had given him? A. No, sir. I did not.
"Q. All right, sir, Doctor, do you have an opinion which you can state with reasonable certainty as to the need for future treatment of J. D. Shelton, if so, I would like for you to state it?
"A. Yes, I think it would be, that is in the future.
"Q. That you think it would be necessary?
"A. Physical therapy would benefit his arm some.
"Q. What do you mean by physical therapy, for the purpose of the Court and Jury, Doctor?
"A. That is a science that deals with the use of heat and massage, and manipulation, and measures of that kind to increase the function of Mr. Shelton's extremity.
"Q. Now, do you have an estimate at this time with reasonable certainty as to length of time those physical therapy treatments will need to continue on J. D. Shelton?
"A. Well, let me say this? Therapy was started at one time, and because it was painful to him he stopped the therapy, and has not taken it any more, although, it
196] might increase his function, if he could tolerate the discomfort of it, and it is anticipated that over a period of another six months, possibly, two or three times a week, that such therapy would be indicated, and that such therapy would cost approximately $5 per treatment.

"Q. All right, sir, do you mean by that, then, that, well, do you know of any other treatment, surgery or otherwise that would help J. D. Shelton, other than physical therapy over a period of a few months?

"A. Yes, sir. It is entirely possible that additional surgery in the form of nerve transplant would be necessary in the future.

"Q. Would that be to relieve the pain and the suffering? A. That would be to relieve pain and suffering. This procedure has been considered several times before, and has been postponed, because it was thought that the patient was making progress without this surgery.

"Q. Now, Doctor, what would you say is the reasonable value of the services that Mr. J. D. Shelton will need considering those things you have pointed out? Possible surgery, and physical therapy, if you have an estimate, we would like to have it in your professional opinion?

197] "A. I would say $500.

"Q. All right, sir?"

Mr. Smith: At this time, your Honor, we would like to state with respect to our last exhibit and with respect to those bills he testified to totaling $468.00, we won't pass them to the jury because they have already been stipulated to, anyway.

Your Honor please, we understand that these exhibits which we offered were admitted?

The Court: Yes, let the exhibits be admitted.

(Plaintiffs' exhibits, including 11, were received in evidence.)

Mr. Ogden: May I proceed, your Honor?

The Court: Yes.

Mr. Smith: If the Court please, may we ask Mr. Ogden to indicate which is the question and which is the answer, to the jury?

Mr. Ogden: I will, if your Honor please, if there appears a necessity for it; in other words, just like this

first one:

Deposition Cross Examination

"Doctor, would that include, the $500, you think he would need in the future, this would include the physical therapy?

"Yes, sir."

I don't think it's necessary to say "Answer", do you?

198] Mr. Smith: We won't know whether he is testifying, or the doctor; that is, the jury doesn't.

Mr. Ogden: You have a copy of the deposition.

Mr. Smith: I am referring to it so the jury will know which is the doctor testifying and which is the question being asked.

Mr. Ogden: Whatever the Court directs me?

The Court: Well, I guess you had better do that.

Mr. Ogden: All right, sir. Just takes more time to say "question" and "answer", but I will be glad to do it. I will start with the first one.

(Reading)

"Q. Doctor, would that include, the $500, you think he would need in the future, this would include the physical therapy? A. Yes, sir.

"Q. That would include the operation, if one is needed? A. Yes, sir.

"Q. And of course, you don't think one is necessary, or you would have performed it, isn't that right?

"A. To date, yes, sir.

199] "Q. Up to this date, you didn't think it necessary?

"A. No, sir.

"Q. But you say it might be necessary in the future, with no way to tell?

"A. Yes, sir. That's correct.

"Q. It might, or it might not. So, since you don't think he needs it now, and don't know whether he will need it in the future, or not then, actually, so far as you are having any fixed opinion about it at this date, you say physical therapy might help him, but, he didn't want to take physical therapy, is that right?

"A. Well, that's right. Mr. Shelton stated it was uncomfortable.

"Q. But, you, so far as you know, from your practice as a medical doctor, ordinarily, actually it is not uncomfortable, is it, Doctor?

"A. Sometimes the stretching of tight scar tissue is uncomfortable. Yes, sir.

"Q. Well, of course, stretching of it, but if you just rub the arm, physical therapy, all that is is just putting heat on the body and rubbing or massaging, isn't it?

"A. No, sir.

200] "Q. Well, what else do you do besides that?

"A. In addition to the method that you stated of rubbing, and heat treatments, there are other methods of electrical stimulation, and of gentle active and passive motion, which means, the patient using the muscle himself against resistance; the passive motion meaning someone else stretching which will give an increase in the range of motion of scarred joints or tendon extremity.

"Q. Doctor, you can actually take physical therapy at home, can't you with yourself? Get one of those lights and put it on you, and that is all it is, electrical light?

"A. Well, that is a form of physical therapy. Yes, sir.

"Q. It's a form of physical therapy to just use the arm in dressing yourself? A. Any physical measure that increases the range of motion, and improves the function is a physical measure of improvement.

"Q. Doctor, what does the word, so the Jury will understand, and I am sure opposing Counsel understands, but the Jury might or might not; what does the word therapy mean?

"A. Treatment.

201] "Q. Treatment? So then, when you say physical therapy, that would be, that would be just take one person, and rub the arm, or a person could do it himself, or exercise the arm, or put heat on it, or any of those things, that is what physical therapy means, isn't it?

"A. That is all physical therapy, but that is not

just physical therapy. I would like to point out that a trained therapist can definitely aid a patient in many instances more than the patient can aid himself. There are certain motions that a person would need help with, for example, in Mr. Shelton's case, he is not under his own power able to put the hand in such a position as to tie an apron behind his back, though another person trained to do so might aid that motion.

"Q. Yes, sir. Now, then, Doctor, so physical therapy, that would cost about $5 a treatment, as you say, if he took it? A. If he took it.

"Q. And that would last about six months, would it?

"A. Yes, sir.

"Q. About how many times a week or month would you recommend? A. I would recommend about two times a week, twice a week.

202] "Q. For how long, six months? A. Yes, sir.

"Q. That would be about $5, that would be $10 then if he took both of them per week every week, $10 a week would be about 300 and some odd dollars for six months, wouldn't it? The whole thing, you said you thought it would run, if he had to have the operation about $500?

"A. Yes.

"Q. Now, then, Doctor, at this time you wouldn't recommend any other operations, would you?

"A. No, sir. Judge Ogden, I would not.

"Q. Don't you think he is making good improvement, Doctor, under your care?

"A. I would rather not use the word good improvement. I would rather use the word that he has made slow improvement.

"Q. Do you think he will make improvement in the future?

"A. I hope that he will. His improvement in the past has been quite slow, and he makes his greatest improvement, usually during the first year after an injury.

"Q. Yes, sir. Doctor, is it not true after an opera-

203] tion that just the operation itself causes a person to take a while to get over it, and thoroughly recuperate from it before he can start making any marked improvement? A. Yes, sir. That is quite true.

"Q. And isn't it true from the ordinary course of events and your experience as a doctor, that you can expect that patient to make improvement in the future? You expect that, don't you?

"A. Yes, sir. I expect him to make some improvement.

"Q. In the future? A. I would like to point out in the testimony if I may, please sir, at the rate of improvement that he has been making recently, at his last visit his range of motion of the elbow was stated as 90 degrees of flexion, and 120 degrees of extension, and from October of, October 24th, '55 the range of motion at that time was 90 degrees of flexion and 120 degrees of extension.

"Q. Yes, sir? A. Now, the patient has gained the power of turning the palm up and down in that length of time, but has not gained the power of straightening or bending the elbow.

204] "Q. Yes, sir?

"A. In that interval of time it would be what, five months, is that right?

"Q. I presume, Doctor. Dr. James, you use the word supination, does that mean to turn the hand over so the palm would be up? A. That is correct, yes, sir.

"Q. Now, if I turn the hand so the hand is skyward, I have supinated the hand?

"A. Yes, the actual motion of supination from the mid position with the thumb pointing directly towards the sky.

"Q. All right, if I put my hand like this, and if I turn it with the thumb here, and point it toward the sky, if I turn that to the right, is that, so the palm would be up, is that to supinate, or pronate?

"A. That is to supinate.

"Q. All right, sir, now, then, if I turn it it back so the back of the hand will be to the sky, that is to pronate?

"A. From the mid position it is pronation. Yes, sir.

"Q. From here back there, what, pronate, and supinate?

205] "A. That's right.

"Q. And so, pronate would be to turn my hand to the right, so the palm would be up to the sky, and to supinate, turn it to the left so the palm would be up to the sky, isn't that right? A. No, supinate is to turn it so the palm would be up to the sky.

"Q. First the pronate, and thumb is up to the sky, and supinate is where the palm of the hand is up to the sky, is that correct? A. Yes, sir. That's true.

"Q. Now, then, you told us he had made improvement in that, did you not?

"A. He had gained normal range of supination.

"Q. So, now, the last time you saw him was yesterday.

He had normal range of both supination and pronation, didn't he? A. Yes, sir. He did.

"Q. Wasn't that a good sign to you that he was making improvements? A. Yes, sir. It was.

"Q. And he had not been able to do that, had he, prior to that time?

"A. According to the dates it showed that he had gained that motion. Yes, sir, it had.

"Q. He has gained that. Now, Doctor, when he --

206] "A. (Interposing) May I point out one other thing?

"Q. Sir? A. In connection with that?

"Q. Surely. A. The power of supination and pronation is all below his fracture which is in the elbow joint, and it is below his fracture. It is a forearm motion and not really the so-called, elbow motion.

"Q. Yes, sir, but you did --"

Then "Let him finish", by Mr. Smith.

Mr. Smith: If the Court please, let him read the answer.

Mr. Ogden: (Reading)

"A. The motion of extension and flexion, which means bending and straightening the elbow, is the motion of greatest significance so far as this patient is concerned, because the muscles involved in that motion are the ones that have been bound by scar around the fracture which occurred above the elbow.

"Q. Yes, sir. All right, Doctor, if I appear at any time to interrupt you, it's now after twelve o'clock, and I was just trying to rush for your benefit?

"A. Well, I know you have come from Oklahoma. I just

207] want to serve the Court as best I can and show them if I can by clarifying any of these answers.

"Q. That's all, I want to be sure and get the testimony you have so the Jury will understand you. Now, sir, I want to ask you this question: if I at any time appear to interrupt you, you feel free to tell me, will you?

"A. Yes, sir.

"Q. Now, then, Doctor, before he was able to have full pronation and supination, you said at one time he didn't have it though, did you? A. Yes, sir.

"Q. And that he has regained that, has he not?
"A. Yes, sir. He has.
"Q. And in your opinion will get better in the future?
"A. Not at supination and pronation.
"Q. Well, he is perfect now.
"A. Well, it's as good as it can be.
"Q. But the rest of the other injuries, you think will be naturally, they too will get better in the future?
"A. Well, again let me point out that in the five months period it has not improved. I hope that it will improve with additional use, and I expect it to improve
208] some.
"Q. Yes, sir. You do expect it to improve. Now, then, Doctor, let me ask you this question: When we get to this point of, so that the Jury will understand it, when we get to range of motion, you said here that he had 90 degrees flexion. Would you, so that we can put it in the record here, tell us in ordinary laymen's language, show what you mean by range of flexion?
"A. Yes, sir. Judge Ogden, and I would like to apologize for not making that more clear in my past testimony. Flexion means to bend the elbow so that the hand comes toward the face.
"Q. Yes, sir. A. Extension of the elbow means moving the forearm at the elbow away from the face.
"Q. Yes, sir.
"A. (continuing) Or straightening of the arm.
"Q. Fine, so therefore if I have my arm sticking completely straight out in front of me now, and bend it up toward my face, put my hand close to my face in front of my face, that's called flexion?
"A. Yes, sir. That is the action of flexion.
"Q. Now, then, if I straighten the hand and arm back
209] moving the hand away from the face and out straight like that, that means what?
"A. That means extension, or straightening of the elbow.
"Q. So then, when you said in here in your testimony that it, in one part in your testimony, you said it had 90 degrees of flexion. Now, then, you meant by that, he could bring his hand up toward his face however?
"A. To the 90 degree angle or right angle.
"Q. Or to a right angle, then would that be, so that the Jury will understand, if I take this pencil or any object and put it right straight down on the floor of the desk

and let it stick straight up in the air, if I had my arm straight up like that, that would be 90 degrees, wouldn't it?

"A. That is 90 degrees with the upper arm, but not with the floor.

"Q. Or the desk? Well, now, I am just getting straight, sticking straight up toward the ceiling?

"A. Straight up toward the ceiling.

"Q. Well, say straight toward the ceiling, that is 90 degrees flexion, is it not? A. That is 90 degrees flexion with the humerus, or the upper arm.

"Q. Now, then, how much could you push your arm over, 210] in other words, you never could, you couldn't push it clear down here flat, could you?

"A. Normally the range is approximately 45 to 30 degrees of flexion.

"Q. All right, sir, so then, if he had the arm sticking straight up like this square at the elbow, makes a square turn, with the arm extending straight up at the ceiling, that is ninety degrees, isn't it? A. Yes, sir.

"Q. All right, sir, now, if he had it over, pushed about half way between there and the shoulder, that would be 45 degrees?

"A. That's about 45 degrees, yes, sir.

"Q. And this is about as far as you go anyway?

"A. Depends on the size of the biceps. Ordinarily, your arm, for example, now, is approximately 30 to 40 degrees. We can measure it, if you would like.

"Q. Well, it won't be necessary, Doctor, I just want to be sure, so when we tell the Jury 90 degrees flexion, that they will understand that he couldn't push it clear on over against the shoulder even if he had never been in an accident of any kind, he couldn't do that, could he?

"A. No, sir. That's right. The normal range for Mr. 211] Shelton could be determined on his other arm.

"Q. Yes, now, Doctor, you said he had, let's see, 90 degrees of flexion and a hundred, 120 degrees of extension. Now, what would that mean with reference to the arm sticking straight out? A. That is an excellent question, and I am sorry I didn't clarify that before. When the arm is completely straight, that is measured as 180 degrees.

"Q. All right, sir, the term 120 degrees of extension means that it lacks 60 degrees of full straightening?

"A. Yes, sir.

"Q. Now, then, if he was just pointing right straight

up to the ceiling like that, it would be how many degrees?

"A. 90.

"Q. If you brought it down half way, he would lack 45 degrees, wouldn't he? A. Yes, sir.

"Q. And you said he had 120 degrees? A. Yes, sir.

"Q. And in degrees, would the whole thing be in sticking straight out, you said awhile ago?

"A. 180 degrees.

212] "Q. So, he would lack 60 degrees of having it completely straight at that time?

"A. Correct. Yes, sir.

"Q. Now, as you said here, I believe, Doctor, that he had 87 degrees of flexion on the 7th of February, is that correct? A. Yes, sir.

"Q. 87 degrees of flexion. Now, Doctor, on December 22nd, you saw him, did you not? A. Yes, sir.

"Q. And then, I believe, you said he had then 120 what, 125 degrees? A. 90 degrees of flexion and 120 degrees of supination, and 50 percent of normal, wait just a minute, that is in error, 100 percent of normal supination, and 50 percent of normal pronation. That was not measured in degrees.

"Q. And then the next time he had 100 percent of supination and pronation? A. Correct.

"Q. So, he had gained on that? A. He had.

"Q. Now, Doctor, is this man right handed or left handed? A. Right handed.

"Q. All right, sir, now, will you tell us if it's not
213] an excellent idea for a man who has had an injury of this kind, if you don't recommend it that the use of the arm, use it as much as possible, or doesn't that improve it?

"A. Immediately following surgery, it's a mistake to use it as much as possible, but after the healing processes have taken place, then use by the patient is the best form of treatment.

"Q. Yes, sir. In other words, if he would get out and do light work, it would be an excellent thing for him, would it not? A. If he could do that, it is.

"Q. Well, if he would do it, it would be a good thing for him, wouldn't it?

"A. Well, he has told me that it is painful.

"Q. (interposing) Well, Doctor, pardon me just a minute, I don't want you to tell me what he told you, I just want to have it in your opinion. It would be a good thing for him to do light work?"

Mr. Mountcastle: And then Mr. Smith, interposing, "I believe, now, he said that if he could."

Mr. Ogden: By me, Mr. Ogden:

"Well, I am asking the doctor now, if you see fit to
214] make an objection, let me finish my question. I am cross examining him."

Mr. Smith: If the Court please, I believe that these side remarks here of both Mr. Ogden and myself are improper before the jury, and if Mr. Ogden is not willing to forego them, I'd like to approach the bench.

Mr. Ogden: Well, I don't care anything about reading them. I just wanted to read the questions and answers.

Mr. Smith: That's all we are interested in.

Mr. Ogden: But I was just reading the whole thing so it would all be connected up, is the only reason I was doing it.

All right, I will read the next question.

(Reading)

"Now, Doctor, I want to ask you if it isn't a fact, that it would be a good thing for him in your opinion if he would do light work, so as to exercise that arm as much as possible? A. I think it would.

"Q. You think it would?

"A. And he has been so instructed.

"Q. You have instructed him to do that?

"A. Yes, sir.

"Q. And he has attempted to do --

215] "A. And he has attempted.

"Q. Well, did you see him? A. No, sir.

"Q. Then you don't know whether he did or not?

"A. No, sir. Only by his testimony.

"Q. Well, I move to strike all that --"

Now I'll go down to --

Mr. Smith: You didn't read the answer.

Mr. Ogden: Well, I will just read the whole thing.

(Reading)

"Q. Well, I move to strike all that and I will tell you why, so the Court -- A. I know why.

That's the answer. He said he knew why.

By me: (Reading)

"That would be what he said and not permissible.

"Mr. Smith:"

Mr. Smith: Now --

Mr. Ogden: (Interposing) Well, I thought you said you wanted me to read it.

Mr. Smith: I wanted you to read the answers to the questions and not our side remarks.

The Court: Well, all right, leave out the side remarks and just read the questions and answers.

Mr. Ogden: Answer, this is apparently an answer without a question.

216]

(Reading)

"I am fully aware that anything the patients says is hearsay, and I don't mean to keep putting that in."

That's the answer to the question.

(Reading)

"Q. Sure. A. However, as the Court is thoroughly familiar with the fact that the patient's history is a very integral part of the decision as to the patient's condition.

"Q. Yes, sir, but you also realize, -- "

Then there are some other side remarks in there and then:

(Reading)

"Q. Doctor, you realize that, if the doctor asks a patient, 'Do you feel pain?' and he tells you that he does feel pain, and although the doctor doesn't see the pain, that is some of the so-called subjective or things that the patient tells you are important, however, objective findings are what the Court is mostly interested in.

"A. I am aware of that."

I will just skip all that down to the next question.

Mr. Smith: I just made this objection to that, you telling the witness that he can't testify to that.

217] Mr. Ogden: Now if the Court please.

The Court: Well, now wait a minute.

Mr. Smith: I will withdraw the objection then.

Mr. Ogden: All right, that's what you are reading, what the Court told me to not read.

The Court: All right.

Mr. Ogden: I am just going to go on down, I don't know what page, just come to the next question and answer.

The Court: You just go ahead and read the next question.

Mr. Ogden: That's what I was trying to do, Judge, just get to it.

(Reading)

"Q. (continuing) This patient, the first x-rays, I don't know whether you had those last x-rays marked, or not, or identified by the reporter, but the first x-rays you had showing the fracture where it was, and for the benefit of the Court and Jury, in the forearm from the elbow down to

the hand, am I correct in saying there are two bones in that?

"A. Yes, sir.

"Q. And then from the elbow up to the shoulder, there is only one bone? A. Yes, sir. That is correct.

"Q. What is the bone called from the elbow up to the
218] shoulder?

"A. That is called the humerus, h-u-m-e-r-u-s.

"Q. And about how big is that bone in this case?

"A. You mean in length, or size?

"Q. Size, the diameter, I should say.

"A. It is approximately three quarter of an inch in diameter at its smallest part; it is approximately an inch and a half at its largest part; it is approximately 12 inches in length.

"Q. Yes, sir. Now, all right, sir, Doctor, the fracture in which you found on July 3rd, 1955, I will ask you to tell the Court and Jury if that was above the elbow joint?

"A. Yes, sir. It was above the elbow joint.

"Q. And about how much in inches or whatever method you would use?

"A. Well, the fracture is, being multiple, meaning several different fractures, extends over a distance of approximately two inches.

"Q. Two inches. All right, sir, so he had a fracture which was in length about two inches long above the elbow, is that right? A. He had several fractures that were about two inches in length.

"Q. Well, Doctor, that's what I mean. When you say
219] several, it is to me, kind of confusing. Do you mean it was fractured in one place a space about two inches long and broken into several different pieces in that two inch space, is that what you mean?

"A. Let me clarify. Within a distance of approximately two inches, there are multiples fracture lines appearing on the x-rays, and more than one simple fracture.

"Q. Now, then, that was a bone broken in more than one place? A. Yes, sir, a fracture in this instance is a term used to mean a complete break.

"Q. A complete break. So, the arm was broken above the elbow at a space of about two inches long. The fracture, the whole fracture was about -- A. Fractures.

"Q. Fractures we will say, about two inches long?

"A. Yes, sir.

"Q. Now, about how far above the elbow do those

fractures begin? A. About two inches.

"Q. About two inches?

"A. And they extend right into the elbow joint.

220] "Q. All right, sir, and then it was about two inches long? A. Yes, sir.

"Q. Now, then, so when he came to you with this fracture, he just had the arm in a sling, or cast, and over his clothing, is that right? A. Yes, sir.

"Q. Do you remember about what time of the day you saw him on July 3rd, sometime in the evening, I presume?

"A. I believe it was about five or six o'clock in the evening.

"Q. All right, sir, now, in addition to that, the only other damage you found was the cut or laceration under his nose, and on the chin, and in the forehead, is that right?

"A. Yes, sir.

"Q. The forehead had been sutured up, or sewed up?

"A. Yes, sir.

"Q. Under the nose, about how long was that cut?

"A. Approximately a half inch.

"Q. Half an inch? A. And the same on the chin.

221] "Q. And that had not been sewed, either one?

"A. They had been pulled together with pieces of tape.

"Q. All right, yes, sir, and he had had medical care then? A. Yes, he had competent medical care.

"Q. And then after you saw him, did you take some stitches? How many stitches did you take?

"A. I think I took three beneath the nose, and three or four under the chin.

"Q. They were not dangerous, those injuries you found there, were they? A. No, sir. They were sewed together to try to give him a smaller scar when they healed.

"Q. All right, did they? A. Yes, sir.

"Q. Fine, and the one on the chin healed?

"A. Yes, sir.

"Q. Fine, and the only other thing then that you could find was this broken arm, was that right? That's all you treated? A. That's all I treated him for, was the broken arm and these lacerations.

"Q. These three lacerations about which you have testified. Now, then, Doctor, would you tell us, you have said something in your testimony, about him having been

222] treated in March by Dr. D'Errico? A. Yes, sir.

"Q. Did you find out what examination or -- "

Mr. Smith: If the Court please, may we approach the bench?

(There was a discussion at the bench among the attorneys and the Court, out of the hearing of the Jury, at the conclusion of which the Court states: I will sustain the objection on that.)

(The following again in the hearing of the jury)

Mr. Ogden: If your Honor please, we desire to offer in evidence the deposition from which I am reading now and which has been heretofore identified by the reporter as being the deposition of Dr. James, beginning with the question I just read last and ending with the bottom of page 54, and to which the Court sustained an objection.

I want to make a record of my offer.

The Court: Plaintiff objects, and the objection is sustained.

(The following is the offer of proof, being the testimony in the deposition to which the objection was sustained:

"Q. Did you find out what examination or --
"A. Yes, sir. I have attached to his chart a copy of the neurological examination by Dr. D'Errico.
"Q. May I see that, Doctor?
223] "A. With the Court's permission.

"Mr. Smith: Well, we, of course, our objection goes to all of this pertaining to Dr. D'Errico.

"A. Well, I think I have a copy of that anyway.
"Q. Did you notice whether or not he was treated by Dr. Earl Stewart at Winnsboro, Texas?
"A. I think that he was, yes, sir.
"Q. That was before this accident? A. Yes, sir.
"Q. He was also treated by Dr. D'Errico before this accident?

"Mr. Smith: We object now to this in order to keep the record of procedure straight, to any testimony on the part

of this doctor as to any treatment performed on Mr. J. D. Shelton, by Dr. Stewart or Dr. D'Errico, or any other doctor, unless it could be shown that this doctor was present and in his office and knows of his own personal knowledge what treatments were made, if any.

"Q. Now, then, Doctor, did you find out what he was treated for there?

"Mr. Smith: We object too, of course, to this question for the same reason as set forth before.

224] "A. Yes, sir. Dr. Stevenson treated him for pain. Dr. D'Errico treated him for pain.
"Q. For pain?
"A. And sent him to the physical therapy department at Baylor Hospital for treatment on his arm.
"Q. Well, I am talking about --

"Mr. Smith: (interposing) Now, I object, my objection, of course, to all of that would follow with this motion that it be stricken from the record.

"Q. Doctor, his name is Stewart, isn't it?
"A. I believe it is Stevens, isn't it?
"Q. Well, Stevens is at Sulphur Springs.
"A. That's right, Stevens is at Sulphur Springs.
"Q. And this doctor is at Winnsboro? A. Yes.
"Q. Now, did you find out why he went, before the accident ever happened, to Dr. Stewart at Winnsboro?
"A. No, sir.
"Q. You never did check with him? A. No, sir.
"Q. Did the patient ever tell you anything about ever having been treated down there? A. No, sir.
"Q. Or the history? A. No, sir."

(The foregoing is the offer of proof as described)

(The following in the hearing of the jury)

Mr. Ogden: Now beginning at the top of page 55:

(Reading)

"Q. Did he tell you anything about having been treated by Dr. D'Errico before he was injured?
"A. Yes, sir.
225] "Q. What did he tell you about that?"

Mr. Smith: If the Court please, to save time, if we may understand that our objection would go to this, that's fine.

The Court: All right, overruled.

Mr. Ogden: (Reading)

"Q. What did he tell you about that?
"A. He told me that -- "

Mr. Smith: (Interposing) I'm sorry to interrupt, but I think it should be made clear to the jury that he is speaking here what Mr. Shelton told him.

The Court: That's right, what Mr. Shelton told the doctor, Dr. James.

Mr. Ogden: That's what I thought everybody understood.

The Court: All right.

226] Mr. Ogden: (Reading)

"A. He told me that in March of '55, that he had a condition following a removal of a tooth, that produced a clot that went to his brain, and that it was necessary for him to have some brain surgery by Dr. D'Errico to remove this, to remove this clot.
"Q. So, he told you he had had a brain operation in March by Dr. D'Errico, is that right? A. Yes, sir.
"Q. Did he tell you about any other doctors he had been to see before he came, before you saw him?
"A. No, sir. He did not.
"Q. Now, Doctor, could I ask you now with reference to the August 1st date; you saw him on August 1st, and how did he come to Dallas from Sulphur Springs, if he did come from there, if you know? Did he come in an ambulance?
"A. No, I believe he came by either bus or a car,

perhaps someone brought him, but he didn't come in an ambulance.

"Q. All right, sir, Doctor, when he left the hospital here on the 8th day of July, 1955, I believe that would be about five after the accident, I believe, that it was all right with you for him to leave, was it not? A. Yes, sir.

"Q. Did he walk out under his own power to the ambu-
227] lance? A. He walked out.

"Q. He walked out of here? Well, irregardless of how he came, he could have come on a bus, or car, and it would have been all right, couldn't it, Doctor?

"A. Yes, sir.

"Q. Now, on August 1st, when you saw him, he walked in on his own power, didn't he? A. Yes, sir.

"Q. And he just came up to have his cast removed that day, did he not, Doctor?

"A. And an x-ray examination.

"Q. And you did remove the cast? A. Yes, sir.

"Q. And removed it, and made an x-ray examination, did you not? A. Yes, sir.

"Q. Dr. James, how did you find his condition then with reference to the way it was when he left?

"A. When I had seen him before August 1st, for the last time it was in the hospital. At which time he was then walking, could move from his bed to the bathroom; he had a cast on, he had the same cast on when he came on
228] August 1st. This cast was removed. The appearance of the arm was very good; it looked straight, it looked stiff at the elbow and at the wrist from the immobilization in the cast. X-rays were also made at that time and would you like for me to describe those?

"Q. Doctor, in just a moment, but before I forget it, may I ask you when you put the cast on his left arm here say on July, whatever day it was? A. Third.

"Q. Third, what, was that cast put so his arm would be extended straight out from the bed or was the arm put in a crooked position?

"A. That is an excellent question. His arm was put in the position of function, which is at the right angle position. When I say at the right angle position, that means with the hands instead of sticking straight out from the body, for example, if the elbow is sticking straight out from the bed, you put the hand straight up to the ceiling.

"Q. Yes? A. If the arm is in this position and

it is to the side then the hand crosses about at the waist.

"Q. Yes, sir. Well, will you just tell us how you
229] put that, whether you had it fixed in bed, or how?

"A. Well, it was free at the shoulder to move.

"Q. Yes, sir? A. There was no motion in the wrist, none in the elbow, but freedom of motion of the shoulder.

"Q. Just as an arm would be carried in a sling, did you put it in a sling? A. Yes, sir.

"Q. So he could just keep his arm in a sling?

"A. Yes, sir.

"Q. And is that the way he came to you on August 1st?

"A. Yes, sir.

"Q. He did? All right, sir, now, then, you did x-ray him and remove that cast? A. Yes, sir.

"Q. Now, then, when you x-rayed him on August 1st -- you offered that x-ray in evidence here?

"A. I don't believe I have, but I have it available.

"Q. Will you get it there and offer it so the Jury will have a complete picture of the whole situation?

"A. Yes, here it is."

230] Mr. Smith: We have no objection to his offering any of the exhibits that he offered there that day, and the side remarks on the following page deal with that; we want it clear at this time we are perfectly willing for him to offer them.

The Court: No use reading the side remarks then.

Mr. Ogden: Judge Wallace, I just wanted -- I didn't know how to get -- identify the exhibits I wanted to offer there. You can look at it and see, if your Honor please.

Have to be identified there so I will know which one it is.

The Court: I think just start with, on page 60 there:

(Reading)

"Q. Would you identify this, put Defendant's Exhibit No. 1, please, Doctor."

Mr. Ogden: I am sure it is, thank you, Judge.

The Court: You have got quite a lot of testimony there yet, haven't you?

Mr. Ogden: Yes, sir, if I do find Exhibit No. 1 -- ?

The Court: Well, you do that now. We will take a recess for about five minutes.

* * * * *

231] Mr. Ogden: This is on page 60, top of the page, first question:

(Reading)

"Q. Would you identify this, put Defendant's Exhibit No. 1, please, Doctor."

Then Defendant's Exhibit No. 1 marked for identification.

"A. Yes, sir.
"Q. Now, is that the one that you took on August 1st?
"A. Yes, sir.
"Q. Did you take more than one that day, Doctor?
"A. No, sir.
"Q. All right, sir, then we will offer Defendant's Exhibit No. 1 into evidence. Now, what is that one you have in your hand, Doctor?
"A. This is the film dated December 22nd.
"Q. Will you let that be identified, please sir?"

Now Exhibit No. 1, if your Honor please, is right here, and I will offer that now.

232] The Court: All right.

(Defendant's Exhibit No. 1, being x-ray, was received in evidence.)

Mr. Ogden: I will place this right in the view finder.

(Reading)

"Will you let that be identified, please, sir?"

Defendant's Exhibit No. 2 marked for identification. It's dated, the date of it will identify it anyway.

"Q. Then, do you have any more, Doctor?"

Then I will offer Exhibit No. 2.

(Exhibit No. 2 is placed in the view box.)

Mr. Ogden: (Reading)

"Then, do you have any more, Doctor?

"A. Here's one dated September 12th, here's one dated August 2nd.

"Q. Now, Doctor, I didn't have it down here that you saw him on September 12th, did you see him on September 12th, or can you have that mixed up? Check your records to see if you saw him on September 12th, I didn't think you did, but you may have. I just have August 1st, December 22nd, February 28th, now that's the only dates I have.

"A. I have a film dated September 12th here.

233] "Q. But you didn't see him on September 12th, did you?

"A. I have not written, no, sir, I have not written a note on that date.

"Q. So, then, you have a film there dated September 12th, but you don't have any record of having seenhim on that day? A. No, sir.

"Q. Could you have these films mixed up with anybody else's films, Doctor? A. I don't believe so. They are properly labeled, it's a possibility that in my absence on that date, perhaps one of my partners saw him.

"Q. But you then, wouldn't actually know anything about that date? A. No, sir.

"Q. So, if you don't know anything about that, Doctor, we will leave that one out, so you can only testify about what you saw. What is the next one you have there, Doctor?

"A. This one is dated August 1st.

"Q. Would you let it be identified, Doctor?

"A. Yes, sir, this one is dated August 2nd.

"Q. Well, now, you didn't see him on August 2nd, did you, Doctor?

"A. Excuse me, both of them were dated August second.

234] "Q. Both date August 2nd? A. Yes, sir.
"Q. Well, now, you saw him on August 1st, but did you see him on August 2nd?
"A. I have my notes dated August 1st.
"Q. All right, sir? A. And my films are dated August, one is dated, I believe they are both August 2nd. There is an obscure date, and obscuring of the date, no, they are both dated August 2nd.
"Q. All right, Doctor, will you let those be identified as Defendant's Exhibits, just put them all together if they have dates on them?
"A. They have dates; yes, sir.
"Q. All of them that are dated August 2nd?
"A. They are all dated August 2nd.
"Q. Were the dates right on the film proper?"

That's the question. Then by me:

"It won't need any further identification, just hand it to the reporter.

"A. I have run out of clips.

"Mr. Ogden: That's all right.

"A. This one is September 12th.
235] "Q. Well, September 12th? Now, leave it out, because you didn't have any record."

Mr. Smith: The discussion, we move to leave out the side remarks.

Mr. Ogden: Well, I am leaving it out. I didn't attempt to.

(Reading)

"Q. (continuing) Doctor, how long was he in the hospital, on August 1st, when he came back, will your records show that? A. No, sir. I don't believe they do.
"Q. Well, was he in the hospital?
"A. I believe Dr. D'Errico admitted him to the hospital for some examination and physical therapy, however I was of the opinion he was in the hospital in November under

his service.

"Q. But on August 7th, there is no record that he just came up, and you took off the cast?"

Now I'd better offer, if your Honor please, this exhibit here. I think it has properly now been identified. This is Exhibit No. 3 apparently. It's got something on it, something white on it. I don't know what it is. I'll rub it off.

(Exhibit 3 was placed in the view box.)

Mr. Ogden: The next question, if I have my place correct:

236] (Reading)

"Q. Here in this office? A. Here in this office.

"Q. Didn't even go to the hospital? Then he went on home from here? A. That's right.

"Q. Then on October 3rd, was he here then?

"A. Yes, sir, but on that day he was sent to the hospital.

"Q. All right, sir. A. On 10-3-55.

"Q. All right, sir, now, how long did he stay in the hospital at that time?

"A. Approximately five days, as I recall.

"Q. All right, what was done at that time?

"A. The operation that I described above in which the sharp pieces of bone --

"Q. (interposing) Yes, sir?

"A. And the nerve was transplanted.

"Q. Now, Doctor, isn't it a fact that any person, if he has had an operation for a broken bone, that a lot of times that the nerve will cling to the bone, grow against it, and you have got to remove, transplant it and get it away from there? A. I don't know.

"Q. Well, when you say the nerve was transplanted

237] would you describe that to the jury, please?

"A. Well, the nerve was moved from some scar and new bone that had formed around it, and encased the nerve in at this time.

"Q. Yes, sir. A. Scar tissue at the site of the broken bone; that nerve was then carefully picked away

and cut away from the scar in such a manner as not to disturb the nerve or to injure it, and put it in a new position where there was no scar.

"Q. Yes, sir. And in other words, a bone, when a bone is broken its wall will form sort of a callus formation, there will be a scar there, and the nerve gets in that, gets imbedded in it; then the, it can't function, is that correct? A. That's correct, sir.

"Q. And so in order to get that nerve so it will function properly, it is necessary to go in there and just move the nerve away from that imbedded position and out in a free position, so it can function? A. That is true.

"Q. And that is what you did in a sense?

"A. That is what I did.

238] "Q. And after that, did it function better then?

"A. Yes, sir.

"Q. Do you know of any reason why it won't function good in the future? A. No, sir, I do not.

"Q. You think it will, Doctor? A. I think it will. Now, for the clarification of the Court --

"Q. Yes, sir? A. There is another nerve of importance, known as the ulnar nerve.

"Q. Yes, sir? A. And consideration of the same procedure in that nerve, the moving of that nerve was considered, and was postponed and is still being postponed, because we feel that we will not offer him enough encouragement by doing that at this time to --"

Mr. Smith: I believe that's "improvement".

Mr. Ogden: Well, this is the answer:

(Reading)

"And consideration of the same procedure in that nerve, the moving of that nerve was considered, and was postponed and is still being postponed, because we feel that we will not offer him enough improvement by doing that at this time to --

"Q. To justify it?

239] "A. To justify doing it, and in my previous testimony about future expense we were referring to the ulnar nerve transplant and not the nerve that has already been transplanted.

"Q. So that the Court and the Jury will understand, what is the name of the nerve that you have moved over already? A. That is known as the radial nerve.

"Q. The radial nerve, and the other nerve that you said might be necessary to transplant, to move over as you have this one was called the ulnar nerve? A. Ulnar.

"Q. And you don't know whether or not that will be necessary? A. No, sir. I do not.

"Q. And if it does become necessary, that can be determined in the future? A. Yes, sir.

"Q. At about what you have estimated about expenses?

"A. Yes, sir.

"Q. Now, then, that is on August 3rd, and then he came back here on December 22nd, you saw him, did you not?

"A. Yes, sir. December 22nd.

240] "Q. How was he getting along then, Doctor?

"A. Well, I answered this once before about his range of motion of the elbow, and also I have in the history that he had been in the Veterans Hospital in the interval in between.

"Q. Well, of course, Doctor, at the Veterans Hospital, I want to ask you this: if the Veterans Hospital only did -- just a second. Well, while I am looking that up, I will ask you a question so you can be answering, it will take just a moment to find it here. I will ask you Doctor, for the purpose of the Jury, if he had been going to a Veterans Hospital, and they didn't have an orthopedic man there? A. Yes.

"Q. What would he want to go there for then?

"A. The purpose was for neurological consultation.

"Q. All right? A. His purpose in going to the Veterans Hospital was that he was uncomfortable. He states, realizing an objection from the Court, that he had discomforts, and he no longer had financial resources in which to go into a civilian hospital.

"Q. Yes, sir, and that is the reason for attending

241] the Veterans Hospital at McKinney, Texas? Did he tell you, Doctor, when he had this other trouble and had to have this brain operation in March, 1955 by Dr. D'Errico, whether or not, he had been affected, his whole right side weakened. A. The answer is no.

"Q. Doctor, did he tell you how this blood clot on his brain affected him? A. No, sir.

"Q. Did you discuss that with him? A. No, sir.

"Q. Doctor, I have here a report, or purported report from the Veterans Hospital down here, where it says, 'This the following itemized statement reflects the cost of services rendered John D. Shelton. Urinalysis routine $2; serology blood test, Wassermann, $10; blood count, $8; room and board, $175.' Now, if that's all they did, that was not proper treatment for a man in his condition, was it?

"A. I don't believe that statement you just read states what his treatment --

"Q. (interposing) Well, I just, I will ask you if that is what they did, that wouldn't show proper treatment, would it, Doctor?

242] "A. That shows only laboratory studies; it does not show examination, or anything of that sort.

"Q. That would not be proper treatment, just what they gave him here, would it?

"A. That is not considered treatment at all.

"Q. In other words, --

"A. (interposing) That is part of the laboratory examination you have. That is just laboratory examination in a hospital.

"Q. Yes, sir. Then, room and board $175, consequently, if that is all they have this charge here for, that was no treatment at all, was it, Doctor?

"A. Well, for the clarity of the Court, may I state that I have in confidence privileged communication from the Veterans Administration showing --"

And then an answer, page 72:

"That the patient was examined.

"Q. (interposing) Doctor, just a minute, now, we will have to insist, if you say it is privileged, that you don't -- my question Doctor, is pretty simple, I just read this off, off that report, and I asked you if that is considered treatment right there?

"A. No, sir. It is not at all; if --

243] "Q. (interposing) I don't think the Veterans Administration --"

Then on line 20, on that same page, Mr. Smith:

"A. Well -- "

Then we go to page 73:

"Q. (Continuing) Now, then, Doctor, I want to ask you a question here: on December 22nd, I had got to that, he came here on that occasion, did he not?

"A. Yes, sir.

"Q. Now, did you go, did he go to the hospital then, was he a patient in the hospital? A. No, sir.

"Q. How long was he here, if you know?

"A. Perhaps an hour.

"Q. And just here in your office?

"A. For examination, yes, sir.

"Q. And you have told us what you found on December 22nd? A. Yes, sir.

"Q. He was making improvement, wasn't he, Doctor?

"A. Yes, sir.

244] "Q. All right, sir, now then, at that time he had a 125 degree extension, did he not? A. 125.

"Q. And 90 degrees of flexion? A. Yes, sir.

"Q. And, all right, sir, now, did you x-ray him on the 22nd day of December? A. Yes, sir. I did.

"Q. Do you have that x-ray examination here? There is some more in that other package.

"A. These are all Baylor Hospital films, and I am trying to keep them separated. I don't see them right now. I have a report on my chart to the effect that the x-rays show further evidence of bony union about the fracture site, and another note is to come in for a deposition for next Tuesday.

"Q. All right, sir, now, Doctor, where it says further, read that again, further evidence of?

"A. Of bony union.

"Q. Is that good? A. That is good.

"Q. That is good, so that was a good report, that is normal? A. You expect that to occur, yes, sir.

"Q. Then to come in for a deposition some date, you had that notice there, which is unimportant here. Now, then, the next time you saw him, did you tell him to

245] come back then, Doctor, to see you then?

"A. He came on February the 7th.

"Q. Did he come voluntarily, or did you direct him?

"A. He came voluntarily.

"Q. On that date. All right, Doctor, on February 7th, when he came back, did you just see him here in your office,

or was he a patient in the hospital?

"A. Here in the office again.

"Q. All right, sir, and about how long was he here then?

"A. Approximately an hour.

"Q. All right, sir, and did you x-ray him at that time?

"A. No, sir.

"Q. Did not. Now, then, so what did you do, Doctor, on that day on February 7th, for this patient, if anything?

"A. I examined him on that day.

"Q. Just a physical examination? A. Yes, sir.

"Q. Of the arm, is that right? A. Actually, it amounted to the arm, shoulder, upper back.

"Q. All right? A. The hands.

246] "Q. Now, then, at that time you say, you stated that he had 120 degrees, did you not, of flexion?

"A. Yes, sir. 120 degrees of extension, and 80 degrees of flexion, 87 degrees of flexion.

"Q. Does that mean he was getting better for the flexion, 87 degrees, or worse?

"A. It meant that he had gained three degrees.

"Q. Yes, sir. Gained three degrees. Now, on the 28th, that was yesterday, he came up here, did he come voluntarily on the 28th? A. Yes, sir. He did.

"Q. Did anybody else call and make an appointment for him, or did he just walk in?

"A. No, he came at the direction of his attorney for a pre-deposition examination.

"Q. That was yesterday? A. That was yesterday.

"Q. Was that true on February 7th, and December 22nd?

"A. No, sir. I don't believe that it was true on the 7th.

"Q. Was it, did anybody make an appointment for him

247] or -- A. Frequently he would just come on; he would state that he was hurting so bad, and something would have to be done.

"Q. Do you know whether or not anyone made appointments for him here? A. No, sir. I make the only appointments that are made.

"Q. You make the only appointments? A. Yes.

"Q. And no one made any appointment with you to see him? A. On the 28th of February?

"Q. Yes, that was yesterday. A. An attorney for Mr. Shelton called and requested that the patient be seen.

"Q. So that you could see him immediately before the

examination and know what his present condition was?

"A. Yes.

"Q. But outside of that, he had just been coming in himself without any appointment, is that right?

"A. Yes, sir.

"Q. Or without any request from you, is that correct?

248] "A. Yes, sir. That is correct.

"Q. Now, then, on yesterday, the 28th, did you x-ray him at that time? A. No, sir. I did not.

"Q. Why not? A. The last x-ray that we made showed sufficient bony healing to not justify the expense to the patient.

"Q. You didn't tell him he was getting along so well it was unnecessary to make any further x-rays?

"A. I did not need to see another film of his arm at this time.

"Q. Now, then, have you directed him to return to see you at any other time? A. No, sir. I have not.

"Q. So from the time he left here on the 3rd day of July, I mean, on the 8th of July, came on the 3rd and left on the 8th, came back on August 1st, and I think you said that he left within about an hour then on October 3rd, is when you did this second, I mean this operation on him, and it is stated here about five days then, and so then a total of hospitalization here under your direction and supervision was 10 days, was it not? Five days October 3rd, and five days July 3rd, is that about correct, Doctor?

249] "A. That is about correct, yes, sir.

"Q. And the rest of the time, just been coming into your office checking over with you for a little while, and you talked with him and examined him, and let him go, is that right? A. Yes, sir.

"Q. And you didn't recommend to him to come back for anything? A. That is correct.

"Q. Doctor, of course, you have been practicing here for, since how long? You told us, I think when you started out. A. When I got out of school, medical college, it was in 1944.

"Q. Yes, sir?

"A. Taking out time for military service.

"Q. Yes, sir? A. And orthopedic training, my actual practice started in July, of 1949.

"Q. '49, and did you start here with this clinic in which you are in now? A. Yes, sir.

"Q. In other words, you finished medical college and then you interned, and when you got through interning, you went to take a specialty, you did residency, and you
250] did all of that? A. Yes, sir.
"Q. And then you started actual practice seven years ago right here? A. Yes, sir.
"Q. You have been here since that time, Doctor?
"A. That's correct.
"Q. You haven't seen the other members of the Shelton family? A. Not as their doctor. I have seen his wife and two of the childrer.
"Q. Yes, sir?
"A. And, but not as their physician.
"Q. I understand, and you have told us the best you can of any, of everything you have found wrong with this man from your treatment of him?
"A. I believe I have, yes, sir.

"Mr. Ogden: That's all."

Now just a minute. I said that was all, but I believe I said here:

"One other question, pardon me, Mr. Smith.

"Q. Now, about whether he will be able to do barbering work and things of that kind, why of course, that is just merely an opinion, you don't know, isn't that right?
"A. Purely an opinion.
251] "Q. Purely? A. Based on my knowledge of the patient, and my knowledge of barbering, which as never having been a barber is --
"Q. Sure, but you do know there is a lot of kinds of work he could do? A. I hope there is, yes, sir.
"Q. Well, you do know it, don't you, Doctor?
"A. Well, yes, I think there will be lots of work he will be able to do.
"Q. Dr. James, you have never treated this patient, J. D. Shelton, for anything except the injury to his arm, and that little injury under his nose and under his chin?
"A. That's right.
"Q. That is the extent of your treatment of him, isn't it? A. Yes, sir.
"Q. And you know nothing about any other alleged

injuries which he has, might have received?

"A. No, sir. I am not qualified to express an opinion on that at all.

"Q. All right, sir, and your testimony here is throughout your deposition has been dealing only with the injuries to his arm and the nerves feeding that arm?

252] "A. That is correct."

By me: "That is all." Then redirect examination.

Mr. Smith: If the Court please, may I approach the bench? I think we can leave a lot of this out as repetition.

(There is a brief discussion among the lawyers and the Court at the bench, out of the hearing of the jury and out of the hearing of the court reporter.)

(The following again in the hearing of the jury)

Mr. Smith: Let's put it all in.

Mr. Ogden: Put it all in.

Mr. Mountcastle: Judge Ogden, we are on page 81, according to the record I have, beginning line 18.

The Court: Let's don't put that in.

Mr. Ogden: All right.

The Court: Just read where it's material.

Mr. Smith: All right, go to line 9 on the next page, line 9 on page 82.

Mr. Ogden: Well, I think that ought to be in there.

Mr. Smith: Well, let's put the whole thing in.

The Court: Well, let's don't put the whole thing in just because you two can't agree on it. Just read where it's material.

253] Mr. Smith: It consists of about eight lines to make

it complete, your Honor; I believe --

The Court: All right, go ahead.

Mr. Mountcastle: Beginning on page 81, line 18:

"Redirect Examination by Mr. Smith:

"Q. Now, with respect to, Mr. Ogden, Counsel for the Defendant here, has asked you several questions in this deposition regarding Mr. Shelton's ability to raise his hands in bending his arm, in layman's language, toward the ceiling at a right angle. Now, I wish you would clarify that for us and tell us, sir, when you speak of him being able to bend that arm at a right angle, do you mean that he is able to stick it toward the ceiling, or is that a right angle, insofar as an arm is concerned, in layman's language, so that there won't be a misunderstanding about it when the Jury hears this case?

(Mr. Smith reading the answers, with Mr. Mountcastle reading the questions.)

"A. Would you mind repeating that, I don't understand it.

"(The last question was read by the Reporter.)

254] "A. The patient can bend the arm at the elbow in order to point it toward the ceiling, it is necessary for him to move his shoulder also whether it is pointing toward the ceiling or the floor. In this case it depends to a large extent on the motion of the shoulder, the limitation that the patient has is primarily in his elbow joint. However, he still has some limitations in his shoulder joint also. Does that answer the question?

"Q. I believe it does, Doctor. Is he able from your examination of him to raise that arm at a right angle with his body? A. No, sir. He is not.

"Q. Now, Doctor, with respect to your testimony about Defendant's Exhibit No. 3 -- I just want to be sure that we have them where they can be properly introduced. What are those two exhibits dated, what date, please, sir?

"A. I see on here, 8-2-55.

"Q. Now, I will ask you if you have seen him on that date? Will you tell us please, sir, how you account, if you did see him, tell us, and if you did not, how you account for those exhibits being dated that date?

"A. I have a date in my record of August 1st, of
255] the x-rays dated August 2nd. It is apparently in conflict with the date in the record. It is entirely possible that there could be an error in the date placed on the chart, or on the x-rays, which occasionally does happen. The fact that there is one day's difference there may mean that he was in the office and had an x-ray made, but that I did not see him until the next day. I do not recall the details of that.

"Q. Are you positive that Defendant's Exhibit No. 3 are pictures of J. D. Shelton, please, sir?

"A. Yes, sir. I am.

"Q. All right?

"A. And I think that the films throughout this entire series are Mr. Shelton's films."

Mr. Mountcastle: That's all.

Mr. Ogden: (Reading)

"Recross Examination

"Q. As far as you know, you didn't actually take them, you don't know that, you are a doctor, you don't do that? A. No, sir. I have in this office an x-ray technician that takes these films as we direct her to take them, and that is true at Baylor Hospital also. I never make the film.

"Q. You don't know whether they are actually right
256] or not? You tell somebody to make them, and they bring them back, and that is as far as you go on, isn't that right, Doctor? A. It is the job of the technician to lable the films properly.

"Q. To take them and label?

"A. Take them and label them.

"Q. You don't go down and watch them take them or develop them? A. Actually I --"

Then we go to the next:

"Q. (continuing) Well, in your testimony with reference to how Exhibit No. 3 was taken, they were taken in the same manner as all the rest of them, weren't they, Doctor?

"A. I didn't take any of the films.

"Q. In other words, what is true about all of the others is also true about exhibits, Defendant's Exhibits No. 3 as to their method of being handled?

"A. Not so far as that particular date is concerned.

"Q. I know, but so far as taking the picture, and so forth? A. I do not take any of the film, the technician does.

257] "Q. All right, Doctor, to clarify it, were these pictures taken under your direction? A. Yes, sir.

"Q. And in accordance with the standard techniques?

"A. Routine technique of taking these pictures."

Then these are questions by Mr. Smith:

"Mr. Smith: You are a competent doctor from a standpoint of analyzing and reading x-ray pictures, are you not?

"A. In this particular case, I am, yes, sir.

"Mr. Smith: All right, sir, that is all."

And that concludes that deposition, your Honor please.

Now if your Honor please, we offer the deposition together with the exhibits heretofore identified on cross examination of Dr. James.

The Court: All right. Cross examination of Dr. James, together with the exhibits referred to therein, admitted in evidence.

Mr. Smith: Your Honor please, plaintiff offers as its Exhibit No. 12, I believe, the direct and redirect examination of Dr. James, and also the plaintiffs' exhibits that were demonstrated here in connection with the deposition.

The Court: All right, let them all be admitted.

258] Mr. Smith: Next, your Honor, the plaintiff would like to introduce into evidence the photographs of the

station wagon of the Sheltons which at the pretrial were labeled and marked Plaintiffs' Exhibits No. 3 and 4, and now for the purpose of the record they will be No. 13 and 14 for the plaintiffs.

The Court: All right, let them be admitted.

(Plaintiffs' Exhibits 13 and 14, being photographs of the station wagon, were received in evidence.)

Mr. Ogden: We don't have any objection to them.

The Court: All right.

Mr. Smith: In that connection, your Honor, we would also like to offer these two exhibits which were present and agreed that they would be offered at pretrial, Defendant's Exhibits 1 and 2 reflecting the picture of the Cadillac automobile.

The Court: Will they be the same numbers?

Mr. Smith: They will be Plaintiffs' Exhibits 15 and 16.

The Court: Let them be marked.

Mr. Ogden: We have no objection.

Mr. Smith: May I mark them; I am sorry.

(Plaintiffs' Exhibits 15 and 16, being photographs of the Cadillac, were marked for identification.)

The Court: All right, let them be admitted.

(Plaintiffs' Exhibits 15 and 16 were received in evidence.)

259] Mr. Smith: Next, your Honor please, we would like to offer in evidence the stipulation between counsel for the defendant and counsel for the plaintiff as to doctor bills which had been incurred by the plaintiffs through the 29th day of February, 1956, as Plaintiffs' Exhibits No. 16 and 17.

The Court: All right, let them be admitted.

(Plaintiffs' Exhibits 16 and 17, being doctor bills, were received in evidence.)

Mr. Smith: To save passing this to the jury, if I may I would just like to briefly state what the bills are.

The Court: All right.

Mr. Ogden: We have no objection.

Mr. Smith: Dr. T. H. Stevens, $62.50; W. B. Carrel Clinic, $463.00; Baylor University Hospital, $348.10; Medical Arts Clinic, $103.00; George A. Brewer Ambulance Service, $20.00; Bettes Funeral Home, $88.50; Dr. Stevens, $27.00 and another $27.00.

Now these last two doctor bills from Stevens, one is for Mrs. Shelton and the other is for one of the children, Larry.

Then Baylor Hospital for Mrs. Shelton, $77.20; Dr. Surratt for Mrs. Shelton, $12.50; Dr. Milton Davis for Mrs. Shelton, $25.00; and Dr. Cherry for Mrs. Shelton, $50.00; Dr. Stevens for another one of the children, Robert, $27.00;
Mrs. Buggs, a nurse for Robert, $9.50; Dr. Davis, for
260] Robert, $350.00; Baylor University for Robert, $125.50;
Dr. Surratt, for Robert, $10.00; Hopkins County Memorial Hospital for Robert, $17.95.

Dr. Cherry, for the child Larry, $500.00; Baylor University Hospital for the child Larry, $148.05; Baylor University, Miscellaneous item for children of $5.00.

Hopkins County Memorial Hospital, $13.95 for Larry, and another bill for Dr. Stevens for Larry of $27.00; and Baylor University for Larry, Baylor Hospital, $5.00.

Hazel McConnell, nurse, $20.00; and for nurses Theland and Scruggs, $22.50, and Nelson Drug Store, $125.00, filling prescriptions.

That totals some $2,710.15.

The Court: All right, let them be admitted.

Mr. Smith: Could it be stipulated as to the Veterans bill to save the procedure --

Mr. Ogden: Well, you and I discussed that out of the presence of the jury and out of the presence of the Court.

(There was a discussion at the bench, out of the hearing of the reporter and the jury.)

The Court: All right, Court will recess until 1:30.

* * * * *

262] VENERA SHELTON, a plaintiff, called as a witness on behalf of the plaintiffs, testified as follows:

Direct Examination by Mr. Smith:

Q. What is your name, please?
A. Venera Shelton.
Q. Are you one of the plaintiffs in this lawsuit, Mrs. Shelton? A. Yes, sir.
Q. Speak out as loud as you can so that all the jurors may hear you, please.

Where do you live, please, ma'am?
A. Sulphur Springs, Texas.
Q. And may I ask you your age? A. 40.
Q. 40 years old. Do you have a family?
A. I do, sir.
263] Q. Would you tell us what they consist of?
A. Pamela is 11 years old. You want their ages?
Q. That will be fine. Give us their names and also the ages of the children.
A. Yes, sir. Pamela, 11 years old; Larry is 9 years old; Anita is 8 years old; and Bob is 3, at this time.
Q. What is your husband's name, please?
A. John Dudley Shelton.
Q. Is he sitting here with you throughout this trial?
A. Yes, sir.
Q. Now, please, tell us whether or not on about the

3rd of July of last year, you made a trip into Oklahoma with your family. A. We did. I did, sir.

Q. Would you tell us, please, where you had started?

A. Started to Turner Falls, Oklahoma.

Q. And the occasion for the trip?

A. We were going to spend a couple of days camping out.

Q. All right. Would you tell us what time of day you left Sulphur Springs, please? A. About 8:30.

Q. And tell us what route you followed, if you can, name the largest towns that you went through.

A. We went by Greenville, McKinney, Denton, Gaines-
264] ville, crossed the Red River, went to Marietta, on toward Ardmore.

Q. All right. Now what were you traveling in, please, ma'am? A. A station wagon.

Q. Do you know the model and the make?

A. I believe it was a '52. I am not sure.

Q. All right. You are not sure about that. Now would you tell us, please, ma'am, what if anything unusual happened to you on that occasion?

A. Sir, we had a terrible wreck.

Q. All right. Let's go back a minute and tell us generally what you were taking with you.

A. Well, we had bedding, we had our clothes, we had food, our drink box, camera, and all the things that a person would want to take on a two day trip.

Q. All right, was there anyone in your station wagon other than your family you have mentioned?

A. No, sir.

Q. Now did you have any car trouble or anything after you left Sulphur Springs on that trip? A. No, sir.

Q. Now would you tell us whether or not you saw the accident occur? A. I did not.

Q. Where were you sitting in the station wagon when
265] it took place? A. I was sitting on the front seat, beside of my husband, and baby boy.

Q. Would you tell us, please, ma'am, what position in the station wagon the other members of your family occupied at that time?

A. The three children were sitting in the back seat, the baby boy was standing between Mr. Shelton and myself.

Q. Now did you stop anywhere for lunch that day?

A. Yes, sir, we did.

Q. Tell us where, please.
A. Just at a roadside park across from Red River.
Q. In what state? A. In the State of Oklahoma.
Q. All right. Now I want you to tell us, please, ma'am, what happened to the members of your family when the accident took place, just generally.
A. Well, Pamela, the oldest girl, got a severe bump on the top of her head.
Q. Mrs. Shelton, let me interrupt, and we will get to that in a few minutes. Do you know what position that the various members of your family ended up when the collision occurred, that is, with respect to whether they were in or out of the station wagon?
A. Oh, no, sir, I did not.
266] Q. All right, now why don't you know that?
A. I was knocked unconscious, sir.
Q. Let me ask you this: Before the accident occurred, so far as you know, was your entire family in good health? A. Yes, sir.
Q. All right. Now there has been considerable mention here of trouble your husband had in the latter part of March and the first few days of April, 1955 from a tooth extraction. Do you remember that? A. I do, sir.
Q. Tell the jury whether or not he had his tooth extracted.

Mr. Ogden: Your Honor please, I wish to object to this witness testifying on a subject which requires medical evidence.

The Court: Well, she can tell, she can answer if she knows.

Mr. Ogden: I thought he was getting into the medical.

The Court: Well, the Court will not permit her to talk about medical questions but the objection is overruled. Proceed.

The Witness: May I have the question again, please?

The Court: Read the question, Mr. Sickles.

(The reporter reads the question.)

267] A. (The Witness) Yes, sir, he did.

By Mr. Smith:

Q. Mrs. Shelton, so far as you know, was your husband in good health up until that time?

Mr. Ogden: Your Honor, I want to object to that, your Honor please. It's not competent.

The Court: Overruled.

Mr. Ogden: She is not competent to testify.

A. (The Witness) He did, sir.

By Mr. Smith:

Q. All right, now would you tell us whether or not, and if you know, please, ma'am, whether your husband went to any doctor -- I'm not asking you what was done, but following the tooth extraction, tell us whether or not he was seen by one or more doctors.

A. Yes, sir, he was.

Q. Would you be able to tell whom, please?

A. Dr. Stevens in Sulphur Springs and Dr. Stewart in Winnsboro.

Q. Was there anyone else?

A. Then Dr. Stewart advised --

Q. (Interposing) You mustn't tell what Dr. Stewart advised. Don't let me confuse you, but just let me say that the Court will not permit you in evidence to testify what somebody told you, what somebody else told you. So

268] if you did go to any doctor and you know it, you may testify to that. A. Dr. D'Errico.

Q. Now what occupation was your husband engaged in when he had his tooth extracted? A. He was a barber.

Q. All right. Did he resume his profession as a barber following his difficulty from his tooth extraction?

A. He did, sir.

Q. Would you tell us about when?

A. On the 7th, I believe, of April.

Q. Of what year? A. 1955.

Q. Would you tell us, if you know, about what date

your husband had his tooth extracted?

A. About ten days before the first part of April, which would be about the 20th of March.

Q. Are you testifying to your best recollection of it?

A. That's right.

Q. Now let me ask you this: After your husband returned to his barbering work following his trouble from his tooth extraction, did he make any complaints or lay off work any when he returned to work? A. He did not.

Q. All right, now I will ask you this question: So far as you know, Mrs. Shelton, had your husband suffered any from the tooth extraction -- wait a minute, before
269] you answer; had your husband suffered any effect from the tooth extraction or any disability, any inability to work, so far as you know, after he returned to work about the 6th or 7th of April until the time of the accident?

Mr. Ogden: Your Honor please, we wish to object to that for the reason that the witness is not competent to answer. That's certainly a medical situation whether he was able to work or whether he wasn't, from the tooth extraction, required a medical doctor, in my opinion.

The Court: Read the question.

(The reporter reads the question.)

The Court: Well, I think the Court will permit you to ask her if he was able to work. You have already proved that, though. You have already asked her that question, and you are asking that question again. As to whether he suffered any disability would be a medical question.

Mr. Smith: Yes, sir.

The Court: But she could testify that -- you have already asked her questions, she has already stated that he had gone back to work, had ability to work, but I will sustain the objection to the other features of the question.

Mr. Smith: All right, sir.

270] By Mr. Smith:

Q. May I ask you this, please, ma'am: So far as you know, following his return to work on about the 6th or 7th of April, 1955, from that time up until the time of the accident, did he miss any time from his work?

A. No, he did not.

Q. From any cause? A. He did not.

Q. Before the accident, Mrs. Shelton, did your husband provide for you and your family?

A. He certainly did.

Q. Now I want to ask you when you first -- you said you were unconscious, rendered unconscious by the accident: Would you tell us when you first remembered anything following the accident and where you were? A. Sir, I was in Baylor Hospital, and it was about midnight.

Q. Is that in Dallas?

A. That was in Dallas, Texas.

Q. Now was that about midnight of what day?

A. Of the 3rd.

Q. The 3rd following the accident?

A. Following the accident.

Q. Where were you when you remembered first?

A. I was in bed, sir.

271] Q. Were any of your children with you at that time?

A. No, sir.

Q. Now when did you first, following that, observe any, be with your husband and your other family?

A. The day we left the hospital.

Q. All right, about how long was that?

A. That was on the 8th of July.

Q. All right, and would you tell us, please, what happened so far as you know, what injuries were received by your children, so far as you know? I'm not asking you now for any statement the doctor made, but I am asking you to tell this jury and the Court what you saw with your own eyes with respect to your family's condition.

Mr. Ogden: Your Honor please, she is not qualified to testify.

The Court: She can tell what she saw with her own eyes. Overruled.

By Mr. Smith:

Q. Yes, ma'am. Begin with any of them you want to.
A. After I was dismissed from the hospital --
Q. (Interposing) Now just make it as brief as you can and tell what you saw.
A. Well, Pamela, the older daughter, had a bump on her head, and her elbow had a bad skinned place, which resulted in an ugly scar, that's the slick type of scar, and the child was extremely nervous.

272] Mr. Ogden: If the Court please, I am going to object to that. That's a conclusion upon her part, be her opinion, which would certainly be the subject of medical.

The Court: Well, overruled. Proceed.

A. (The Witness, continuing) Anita --

By Mr. Smith:

Q. (Interposing) Which child was that you talked about? A. Pamela was the first one.
Q. Pamela. Now you said she was extremely nervous and the other things you have mentioned. Was she the oldest or youngest girl? A. Oldest girl.
Q. Oldest girl. What was her age then, Mrs. --
A. She was 9 then.
Q. Now were you through with her? A. Yes, sir.
Q. All right, tell us about the other girl.
A. Anita had two teeth broken out, then her nose, the membrane of her nose was crushed and the child --
Q. (Interposing) Let me interrupt you there, please: Does she have any trouble with breathing now?
A. Yes, sir, she does.

Mr. Ogden: If the Court please, may I have an objection to all this line of testimony?

273] The Court: Yes.

Mr. Ogden: I think it is incompetent.

The Court: Yes, overruled.

Mr. Ogden: Thank you.

By Mr. Smith:

Q. Where were the teeth situated in her mouth that were knocked out, what teeth were knocked out?

A. The teeth were on each side of her -- the two big front teeth, upper teeth.

Q. All right.

A. And the child has been extremely nervous, and she wakes up in her sleep at night and -- doesn't wake up, she has nightmares and starts screaming. I go to her bedside and she is trembling and shaking all over, until I wake her up completely.

Q. Mrs. Shelton, was she bothered with that before the accident? A. No, sir.

Q. All right. A. She has been extremely nervous. When we first were able to go any place in our car, she screamed and didn't want us to drive or anything.

Q. Now when are you talking about, before or after?

A. That was after the accident.

Q. Now that's the younger of the two girls you are
274] speaking of? A. That's right.

Q. Now, please, ma'am, go to one of the boys and the baby, for instance. Tell us what you know and saw troubling him following the accident.

A. Robert, my baby boy, he has a scar about two inches long on the back of his head, the hair won't grow.

Mr. Ogden: If the Court please, I object to this testimony. She is describing the physical things about, said the hair won't grow and things of that kind, which I don't think she is competent to testify.

The Court: Well, she can testify about things that are common or anybody could see. I will overrule the objection on that. Of course I am not going to let her testify to any medical.

Mr. Smith: No, sir, I won't ask her.

The Court: But just what any ordinary person could observe. I think that she should be permitted to answer those questions. All right, proceed.

A. (The Witness, continuing) The scar is of a slick type down to the hairline of his hair where it has to be shingled up. It has not grown hair in fourteen months.

By Mr. Smith:

Q. Now was there anything in his chest or back?
A. Let me get his ear first, sir.
275] Q. All right. A. His ear on the same side was butchered up, and an ugly red scar is back there behind his ear. Then he had two ribs broken and a punctured lung.

Mr. Ogden: If the Court please, that --

The Court: (Interposing) Well, she would know about that.

Mr. Smith: That's already in evidence.

The Court: Yes, the doctor testified to that.

Mr. Ogden: I don't think she would be competent to testify to --

The Court: (Interposing) Well, I know. It's in evidence.

Mr. Ogden: Well, might we let the record show --

The Court: (Interposing) Yes, all right, let the record show.

A. (The Witness, continuing) There were tubes placed in, he has a stab scar here and one in his back where tubes were placed in to make his lungs expand. (Indicating)

By Mr. Smith:

Q. All right, now that's the baby? A. Yes, sir.
Q. Anything else? A. He is extremely nervous. When I go -- I can lay him on the couch and when I go to pick him up, he starts screaming and when he is asleep and I

carry him to another bed, he is scared to be moved.

Q. All right, now that's the baby boy. What about
276] the other boy?

A. Larry, sir, as the jury has heard --

Q. (Interposing) You can't go into that. Now just tell us, please, ma'am, what you know from what you have seen about the other boy, Larry.

A. Larry has a scar extending down the side of his head from where he parts his hair. It zigzags a plug out there and then it zigzags across, and the scar comes on to his hairline, caused from the brain surgery that he underwent in Baylor Hospital. (Indicating)

Q. All right, let me ask you this: Were any of these children abnormal as far as you know, or suffering from any of these disabilities before the accident took place?

A. They were healthy children.

Q. Larry, now, the boy you testified about, before this accident, was he able and did he make his grades?

A. He did.

Q. If so, what kind of grades?

A. He made good grades in school before the accident.

Q. What about his grades in school since the accident?

Mr. Ogden: If your Honor please, I object to this on the ground that the school records would be the best evi-
dence. The records of the school showing what he made
277] before or after.

The Court: Overruled. Go ahead.

A. (The Witness) He has been slow in his studies and has not made near as good grades as he did before.

By Mr. Smith:

Q. I will ask you, please, ma'am, if there is anything that Larry can't do now that he could do before the accident occurred.

A. He cannot play football, baseball, any of those games, or fist fights, anything like that.

Q. All right. Have you observed anything else unusual about your boy, Larry, since the accident?

A. Yes, sir.

Q. Would you tell us --

Mr. Ogden: (Interposing) Judge Wallace, if I may just say this, if the record will show that I am objecting to all this line of testimony on the ground I don't think it is competent.

The Court: Yes, you said that two or three times, Judge, and I have allowed you -- there is no use just keeping on. The Court has allowed you an objection.

Mr. Ogden: To this particular line of testimony.

The Court: Yes, to all this line of testimony. The objection goes to all this line of testimony.

278] Mr. Ogden: Thank you.

A. (The Witness) He will sit and stare into space for as long as five minutes. You can say something to him and he never knows that you have said anything.

By Mr. Smith:

Q. Was he free from that before the accident took place? A. He certainly was.

Q. Now by the way, where are the children today, so far as you know? A. They are over to the families, the grandparents -- the brother has the boy.

Q. Did you bring, you and your husband, did you bring Larry, the oldest boy with you, to Muskogee, when you came up for this trial? A. We did, sir.

Q. When did you come up?

A. We came up on Friday.

Q. Why did you bring him with you?

A. We brought him to have the doctor examine him.

Q. All right, and have you sent him back to Texas?

A. Yes, sir, we have.

Q. All right. Now before I forget, let me ask you this: On the occasion of the trip, did you, who drove this station wagon that day? A. My husband.

Q. Could you drive that station wagon?

279] A. No, sir.

Q. Had you ever driven it? A. - I had never driven it.

Q. Now I'm not going to ask you what your husband's

ailments are because he is here, but I want to ask you: Has your husband worked any, so far as you know, since this accident occurred? A. Very, very little.

Q. All right, would you tell us what you mean, or rather would you tell us what work if any he has tried to do?

A. In the last -- well, he has helped me a little bit around the house, and then in the last month or two, he has ground a few scissors and clipper blades that were brought in to him.

Q. What does he use to grind those that he used?

A. He has a rock.

Q. I will ask you this: Have you been to Oklahoma before this occasion at the instigation or request of anyone, with your son and your husband, to be examined by a doctor or doctors? A. Yes, sir, I have.

Q. And about when was that and where did you go? If you don't remember the specific date, about how long ago?

A. I don't remember the exact date, sir.

Q. I'm not asking that. Just tell me about when.

280] A. About two or three months ago.

Q. All right, where did you go, please, ma'am?

A. Oklahoma City.

Q. And at whose request did you go to Oklahoma City?

A. Mr. Ogden.

Q. Who went with you?

A. My husband and the two boys.

Q. Your husband and who? A. The two boys.

Q. Both boys? A. Yes, sir.

Q. All right. How many of you were examined?

A. My husband and the boys were examined.

Q. Both boys? A. Yes, sir.

Q. Do you remember the name of the doctor that examined them? A. Dr. Ricks examined my husband and the older boy. I don't remember the other doctor's name that examined the baby.

Q. Could it have been Dr. McNeill?

A. I believe that's right, sir.

Q. But Dr. Ricks examined the other boy and his father?

A. He did.

Q. How did you go up to Oklahoma City?

281] A. Went up there by bus.

Q. Now I want to ask you, please, ma'am, if you were in good health before this accident occurred.

A. Yes, sir, I was.

Q. And would you tell us, please, what happened to you when the accident took place as far as your physical condition is concerned? A. I was knocked unconscious, and also, my eye was knocked out.

Q. Let me interrupt: What do you mean by your eye was knocked out, please? A. The sight, sir.

Q. All right, before the accident did you have any impairment of vision in your eye?

A. My eye was a little weak.

Q. Now for the purpose of the record you are pointing to your left eye? A. Yes, sir.

Q. Now is that the eye that was a little weak before the accident? A. Yes, it was.

Q. All right, and is that the eye that was affected by the accident? A. It was, sir.

Q. Would you tell the jury, please, to what extent
282] it was weak before the accident, or what you could do with it before the accident that you can't do now?

A. Well, I could sew, or read.

Q. Did you have to use glasses?

A. Yes, sir, I did.

Q. Since the accident, have you been, what were the results, what about your eye?

A. I have no sight whatsoever in my left eye.

Q. Can you tell darkness from light with your left eye? A. I have no light, sir, no darkness -- it's all darkness.

Q. Now while we are on your eye, please, ma'am, before this accident occurred, was there anything, so far as you know, wrong or difficult or out of the normal with respect to both of your eyes looking in the same direction?

A. I had a good expression in my eye. It focused straight.

Q. Was it crossed in any way? A. It was not, sir.

Q. In other words, could you tell any difference in it from the other eye before the accident occurred by looking at it in the mirror? A. I could not, sir.

Q. Now where did you get the injury to that eye, so far as you know, that is, what part of your face?

A. My eye was cut, my face was cut, rather, on the edge of my eye down across through my nose, through this center part of my nose and stitches were taken there. There were very deep cuts all the way up here. (Indicating)

Q. Since the accident, have you any feeling or

283] disturbance about your left eye or head?

A. I have some severe pain and headaches, sir. Pain collects behind my eye almost continuously.

Q. All right, when did you first notice following the accident anything unusual about the fact as to whether your eyes were crossed or not?

A. I noticed about a month after the accident that my eye was shooting out to the side, as you can see.

Q. All right, tell us whether or not it is getting any worse in that regard as the days go.

A. Yes, sir, it is.

Q. Tell us if there is any time of day that it seems worse than others.

A. Well, usually late in the evening it focuses worse.

Q. Mrs. Shelton, you have told us about your eye and headaches; is there any other part of your body that was affected by the accident? A. I had an awful ugly cut under my chin and throat here, another cut here, another one as you can see over my eye, and I don't know how many others on my face that healed up before I left the hospital.

Q. Did any of that cause you pain?

A. Yes, sir, it did.

284] Q. All right, tell us what else, if anything else, about your body was affected. A. Across my chest I had deep bruises all across here and down this arm. Evidently I hit the dashboard of the car, as I have round circles, bruised circles on this arm. I had two ribs broken.

Q. Now anything wrong with your knee?

A. Yes, sir.

Q. What if anything happened to your knee?

A. This knee has about a four inch scar across this on my knee.

Q. All right. A. And it was very, very deep. They had to put a brace, I mean a support in it before they could take the stitches, and it pains me and it's still stiff when I walk.

Q. All right, what about the other one?

A. The other knee doesn't have quite as bad a scar, the right one, but it was cut in a jagged position.

Q. All right, have you had any pain or discomfort about your body, or do you have any now that you haven't described to the jury? A. Yes, sir, I do.

Q. All right, tell us how you feel now, for instance.

A. Well, I am continually having pain around my

heart and chest, then in the lower part of my back. I suffer from it all the time. The pain goes down both legs.

Q. Mrs. Shelton, before this accident occurred, did
285] you have any trouble with your female organs or anything of that kind? A. I did not, sir.

Q. Since the accident, have you?

A. Yes, sir, I have.

Mr. Ogden: Your Honor please, I want to object to that on the ground that's not even plead. This is the first time it has ever been mentioned. It's not plead in the complaint or anything. We have no knowledge of the complaint.

The Court: Well, overruled.

By Mr. Smith:

Q. Tell us, please, ma'am, what your difficulties are. Are your periods normal now, since the accident?

A. No, sir.

Q. Were they normal before? A. They were, sir.

Q. All right, and were they regular before?

A. Yes, sir.

Q. And are they regular now? A. No, sir.

Q. Just tell us, please, in your own words, what trouble you have now. A. Well, due to the shock and nerve strain that I have been under --

286] Mr. Ogden: Now if the Court please --

The Court: Yes, sustain that objection. Do not regard that statement, ladies and gentlemen.

By Mr. Smith:

Q. I am just asking you to tell the jury what has happened to you now -- tell us what now if anything that is unusual from what happened before the accident.

A. Well, I am going through the menopause.

Q. Mrs. Shelton, did you interfere in any way with your husband's driving on this trip?

A. I did not, sir.

Mr. Smith: Pass the witness, your Honor.

Cross Examination by Mr. Ogden:

Q. Mrs. Shelton, who is your doctor?
A. Where, sir?
Q. After the accident you went to Texas, you told the jury, and went to the hospital and you had a doctor, did you not? A. Dr. Cherry was my doctor and Dr. Davis.
Q. And Dr. Davis? A. Yes, sir.
Q. Now then, I will ask you to tell the jury if your lawyer and I didn't take Dr. Cherry's deposition in his office in Dallas. A. Yes, sir.
Q. That deposition was here, and your name was not
287] even mentioned as his patient, was it?
A. I don't know, sir.
Q. Well, anyway, that's the doctor that you had and took his deposition. A. Yes, sir, I had that doctor.
Q. And he would know about your condition if you had all this, would he not? A. Yes, sir.
Q. All that you told about. We took his deposition. Now Mrs. Shelton, you have told the Court that your youngest son, Larry, was injured, and that he is down at Sulphur Springs, Texas today, is that correct?
A. My youngest son is Robert.
Q. Your youngest son is Robert? A. Yes, sir.
Q. And he was injured and he is in Sulphur Springs today, is he not? A. Yes, sir.
Q. Now then, is he able to travel?
A. Yes, sir, he is able to travel.
Q. He went to Oklahoma City, did he not, since this accident? A. Yes, sir.
Q. Now the other boy, that you said was up here in
288] Muskogee, on last Friday, the 9th. A. Yes, sir.
Q. You had that boy right here in Muskogee, didn't you; where is he now? A. He is at home, sir.
Q. Why did you take him home?
A. We couldn't afford to keep him up here. It takes money to buy food.
Q. So you sent him back. Who took him back?
A. We sent him back on the ambulance that brought Mr. Crawley up here, without any expense.
Q. Sent him back in an ambulance, is that what you said? A. Yes, sir.
Q. That brought Mr. Crawley up here, back to Sulphur Springs, Texas? A. Yes, sir.

Q. Did the ambulance come from Sulphur Springs, Texas? A. It did, sir.

Q. And they brought Mr. Crawley, that's the bus driver that testified here? A. Yes, sir.

Q. Up here, then you sent your boy back homeon that, is that right? A. Yes, sir.

Q. Because you were not financially able for him to
289] stay here in Muskogee from Friday until now?

A. That's right.

Q. That's the reason you sent him back. So you don't have any of the children here so the jury and the Court could see, do you? A. I do not, sir.

Q. But they have been here. Now then, would you tell the Court if you know what this youngest boy weighs now?

A. I believe it's around 42 pounds.

Q. Do you know whether or not he is overweight for a boy of his age, heavier than ordinary boys are?

A. No, sir, I do not.

Q. I beg your pardon? A. I do not, sir.

Q. Do you know, would you tell the jury about his height, what height the boy is, in feet or inches?

A. Well, I haven't measured him, sir.

Q. I will ask you if you do not know, as a matter of fact, that that youngest son is higher, taller than the average youth of his age? A. I don't think he is, sir.

Q. And if he is not heavier than the average youth of his age. A. Not since the accident.

Q. That's what I'm talking about, since the accident.
290] A. No.

Q. Now then, did you have him up here, Dr. McNeill examine him and Dr. McNeill gave his testimony and told what his height should be and how much taller he was and what he weighed, you knew that, didn't you?

A. Where was that, in Oklahoma?

Q. Yes. A. City?

Q. Yes, you knew that, didn't you?

A. I don't know what he said, sir.

Q. He told you that, didn't he?

A. No, sir, he didn't.

Q. You were with the boy when he was examined?

A. I was, sir.

Q. Now the next child was, the next boy was, the youngest was Robert and the next was Larry, is that the way it is? A. Yes, sir.

Q. And Larry is how old? A. He is 9 now.

Q. I'll ask you if he likewise is not overweight for his age, this boy you say is nervous and can't sleep or eat or anything else.

A. He might be a little bit, sir.

291] Q. Overweight? A. Yes, sir.

Q. Always nervous, wakes up and can't sleep, is that your testimony? A. (Nods affirmatively)

Q. All right, now Mrs. Shelton, you told the jury here a moment ago in your direct examination that you got your left eye knocked out, is that correct?

A. Yes, sir.

Q. I will ask you if you recall me and Mr. Smith, your lawyer, taking your deposition and your husband's on the 16th day of August, 1955 in your home, in Sulphur Springs, Texas, before an official court reporter in Texas; you remember that occasion? A. I believe I do.

Q. It was in your home. Now I want to ask you if these answers -- were these questions asked you and if you gave these answers. First, you never even saw Mrs. Franklin's car, did you? A. I did not.

Q. Well, is that because you have the deficient eyesight or because of the fact that you just weren't looking?

A. I was not looking at the time.

Q. What were you looking at?

A. I was looking at the Chicken Shack.

Q. On the right-hand side of the road?

292] A. Right-hand side of the road.

Q. And you did not see Mrs. Franklin's car, you don't know anything about how the accident happened?

A. I do not, sir.

Q. And the next thing you knew after looking at the Chicken Shack on the right of the road was that you waked up down in Baylor Hospital in Dallas, is that correct?

A. That's right.

Q. Now I'll ask you: Would you tell the jury whether or not it was hilly country in that area there or just flat before you came to the scene of the accident?

A. It was a slight rise.

Q. Well, just back of that, was it flat or level country or was it hilly country that you were driving through?

A. It was a slight rise, it wasn't hilly.

Q. I will ask you if you didn't testify on the deposition -- why I'll just read you the question.

Mr. Smith: What page?

Mr. Ogden: Page 76.

By Mr. Ogden:

Q. I will ask you if this question was asked and if this answer was given by you in your home at the time we took your deposition in August following the accident in July:

"Question: Just going on 40 or 45 miles an hour. Now then what kind of country was it, or do you recall, or do you know what kind of country it was, say a mile south of
293] the wreck, whether a level road?
"Answer: I didn't pay any attention."

Was that your answer?
A. I didn't, sir.
Q. I say, was that your answer I just read you there?
A. I believe it was.
Q. "Question: Didn't pay any attention -- your first trip up there? Answer: Yes."

Was that question asked you and that answer given?
A. I believe it was, sir.
Q. "Question: And you had never seen it before?
"Answer: No.
"Question: And you don't know whether it was uphill or downhill?
"Answer: I certainly do not."

Now did you swear to that down in Texas?
A. I have been over the road since then.
Q. Well, I didn't ask you that. I asked you when I asked this question in Texas, was that your answer?
A. I guess it was, sir.
Q. Well, do you know whether or not you gave that kind of testimony?

294] The Court: Well, she testified she thought it was.

Mr. Ogden: Sir?

The Court: She said that she did.

By Mr. Ogden:

Q. "Question: Do you know whether it was uphill just before you got to the scene of the wreck?
"Answer: No.
"Question: Do you know whether --
"Answer: It seemed level to me."

Was that question asked you and that answer given when I took your deposition shortly after the wreck?
A. I guess I did.
Q. "Question: Don't you know you came up over a hill?
"Answer: No, we didn't go over no hill."

Did you give that answer?
A. I guess I did, sir.
Q. Now I will ask you about four or five of these without taking any one -- if you want me to I can ask you separately but I think it will save time.

Question on page 77:

"Question: If you had gone over a hill, you would have noticed it?
"Answer: Sure, if there had been a hill.
"Question: You say on back at least a mile there was no hill that you know of?
"Answer: That's right.
295] "Question: Just a level road?
"Answer: Yes."

Were those questions asked you and did you give those answers?
A. I believe I did.
Q. On the 16th of August. On the same page:

"You could see there wasn't anything to obstruct your view?
"Answer: Not a thing."

You gave that answer?
A. (Nods affirmatively)
Q. "Question: You could see on down the road?
"Answer: I wasn't -- if I had been looking -- I wasn't paying no attention."

Did you give that answer to that question?

A. (Nods affirmatively)

Q. Now on page 78 of the deposition, I will ask you if these questions were asked of you and these answers given?

"Question: What I mean, there wasn't a rise enough to obstruct your view so you would come over a hill and see a car?

"Answer: That's right.

"Question: Level immediately prior to the accident; about what rate of speed were you going?

"Answer: I don't know, when it happened.

296] "Question: You don't know when the accident happened?

"Answer: No, sir.

"Question: You didn't see the other car?

"Answer: I did not see the car."

Were those questions asked and those answers given, Mrs. Shelton?

A. Yes, sir.

Q. "Question: Now did you see anything about the accident?

"Answer: I didn't see nothing. I was knocked unconscious.

"Question: Well, did you ever see Mrs. Franklin's car in the road?

"Answer: I couldn't tell you what color it was.

"Question: You never did see it in the road?

"Answer: I never seen it anywhere.

"Question: In the road or anywhere else?

"Answer: That's right.

"Question: You were not looking down the road?

"Answer: I was looking at the Chicken Shack. That is the only thing I remember.

"Question: That is the only thing you remember seeing?

297] "Answer: That's right."

Were those questions asked and those answers given by you?

A. Yes, sir.

Q. "Question: And if a car got in the road out across or anything, you don't know anything about it?

"Answer: That is correct."

Now on page 81 of the deposition:

"Question: Isn't that correct? Now then, when did you get hurt, if you know?

"Answer: Where did I get hurt?

"Question: Yes.

"Answer: I got my left eye knocked out, have cuts clear across here and across here and under here and under here. (Indicating)"

You gave that answer to the question, did you not?

A. Yes.

Q. Now then on page 83:

"Question: Did you ever have any trouble with your eyes before that time?

"Answer: Occasionally.

"Question: What eye doctor had you been to before?

"Answer: Been to Dr. Hurst at Longview.

298] "Question: For your eyes?

"Answer: That's right.

"Question: When was it you went to him?

"Answer: It has been several years ago.

"Question: What was the trouble with your eyes then?

"Answer: Just weren't good. I went to be fitted for glasses.

"Question: You couldn't see good out of your left eye then, could you?

"Answer: I could see a little."

Did you give that answer?

A. I did, sir.

Q. How many years was that before the accident that you could see a little out of your left eye?

A. You mean how long?

Q. Yes. A. Since I've been to the doctor?

Q. Yes, you told us here in this deposition that in August, we took that, but that before the accident you could see a little out of your left eye. Was that true?

A. Yes, sir.

Q. Now then, how long had your eye been in that condition where you could just see a little out of it before the accident?

A. Well, about ten years that I could see a little.

299] Q. So you could see a little out of your left eye for about ten years before the accident. Now you told the jury here you got your left eye knocked out. It was

already out, wasn't it?

A. I got -- no, it wasn't already out, sir. I got the sight knocked out in the wreck.

Q. All right, you gave this testimony?

A. I did, sir.

Q. And that was true? A. That it was weak, sir.

Q. And you went to Dr. Hurst in Longview?

A. I did, sir.

Q. Did you go to any other doctor for your eyes before this accident? A. A Navy doctor, sir.

Q. When was that? A. About ten years ago.

Q. Now I will ask you if this question was asked you:

"Question: You could see a little out of your left eye?

"Answer: That's right.

"Question: But you went to him primarily on account of your left eye?

"Answer: Yes, and nerves. Nerves, too. I was a little
300] bit nervous from the eye being strained.

"Question: You went to Dr. Hurst in Longview on account of the fact you couldn't hardly see out of your left eye then?

"Answer: Yes."

Were those questions asked you and those answers given in August in your home, following the accident in 1955?

A. They were, sir.

Q. Were they true? A. Yes, sir.

Q. You were nervous then ten years before the accident?

A. That is as far as my eye was concerned, sir.

Q. On page 85:

"Question: Your left eye was very deficient at that time?

"Answer: I wouldn't say that. It still had a little sight in it."

Was that correct? A. That's right.

Q. Now you stayed in the hospital from the 3rd to the 8th, that was five days, was it not, Baylor Hospital?

A. Till the 8th, sir?

Q. Yes, ma'am, of July. The accident happened, we'll say in the afternoon, shortly after noon on the 3rd at Ardmore and you went to Baylor that evening or night.
301] You remained there at the Baylor Hospital until the 8th and then went to your home, did you not?

A. Yes, sir.

Q. Did you have a driver's license?
A. I did, sir.
Q. Do you have one now? A. Yes, sir.
Q. In the condition you are in now, did you get it since this accident, or did you apply to the State of Texas to get a driver's license since this accident?
A. I had it renewed, sir.
Q. Since this accident? A. Well, it was time to renew it at the time of the accident.
Q. My question is to you: Have you applied in your condition to the State of Texas since this accident and gotten a driver's license? You may answer it either yes or no.
A. I did not apply for it, sir. I had it renewed. I just sent in the renewal, see, and they renewed it.
Q. You did send in a fee and got a new license?
A. It happened to be the time it was to be renewed.
Q. You got it after the accident?
A. A day or two.
Q. You have one now? A. Yes, sir.
302] Q. Is that right. Were you taped up after the accident? A. Where, sir?
Q. I was just asking you if you were ever taped up.
A. I could not be taped for my ribs, sir. I was too sore.
Q. I will ask you if on page 88 of the deposition, if I asked you this question on the deposition:

"Question: Have they ever taped you?
"Answer: They never taped me."

A. No, sir.
Q. Is that correct. Then I will ask you if on that date I asked you this question:

"Question: How long did you stay in the hospital at Dallas as a patient?
"Answer: You ask Dr. Cherry."

Was that your answer? A. I guess it was, sir.
Q. Didn't you know how long you stayed in it?

The Court: There is no dispute about that.

Mr. Ogden: All right.

By Mr. Ogden:

Q. Now, you drive a car now?
A. I drive the one we have now, sir.
Q. Yes, do you drive the one -- well, you had that car also then, did you not, you had two cars then?
A. Yes, sir.
303] Q. You still have the Buick? A. Yes, sir.
Q. And you drive it now, do you not?
A. I drive it in town. I don't go on long trips.
Q. Does your husband drive it? A. Yes, sir.
Q. Where does he drive it to?
A. He drives it around town.
Q. Now then, would you tell the Court and jury if you know, the little girls -- one of them was, you gave their ages -- I can't remember just now.
A. Pamels is 11 now. She was 9 when the accident happened. Anita is 8 now. She was 7 when the accident happened.
Q. And they are both in school? A. Yes, sir.
Q. Where is the oldest boy? A. He went back home.
Q. I know. Is he in school? A. He's in school.
Q. Was he in school last year? A. Yes, sir.
Q. You told the Court and jury that your boy, the oldest boy after the wreck was in such bad condition that he couldn't play football and baseball and fight, is that right?
A. Yes, sir, that's right.
304] Q. Did the doctor advise you on that, did he tell you not to let him play that for awhile, for about twelve months or something like that? A. He did, sir.
Q. For about twelve months?
A. Well, longer if he --

Mr. Ogden: That's all.

Mr. Smith: That's all, your Honor.

(Witness withdraws)

VOL. II

No. 742

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TRANSCRIPT OF RECORD

United States Court Of Appeals

TENTH CIRCUIT

VOL. II

No. 5579

MINNIE FRANKLIN, Appellant,

vs.

J. D. SHELTON and wife, VENERA SHELTON, suing herein in their own behalf; and PAMELA SHELTON, LARRY SHELTON, ANITA SHELTON, and ROBERT SHELTON, minors, suing herein by and through J. D. SHELTON, as their next friend, Appellees.

Appeal from the United States District Court
for the Eastern District of Oklahoma

Filed February 23, 1957.
Supplemental record filed March 13, 1957.

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305] J. D. SHELTON, a plaintiff, called as a witness on behalf of the plaintiffs, testified as follows:

Direct Examination by Mr. Smith:

Q. State your name, please, sir.
A. J. D. Shelton.
Q. J. D., speak up if you can so the jury can hear you. What age man are you? A. I am 43.
Q. Are you the plaintiff in this lawsuit?
A. Yes, sir.
Q. You heard your wife testify with respect to what your family consists of; is that true and correct?
A. Yes, sir.
Q. All right, sir, where do you live?
A. Sulphur Springs, Texas.
Q. You likewise have heard your wife testify as to the whereabouts of your family today, is that correct?
A. Yes, sir.
Q. Now what has been your profession in days past.
A. I am a barber.
Q. Mr. Shelton, on the 3rd of July of last year, did you have occasion to take a trip to Oklahoma?
A. Yes, sir.
306] Q. And what time did you leave Sulphur Springs that day?
A. About 8:30.
Q. And if I were to ask you what the purpose of your trip was, would your answer be substantially the same as your wife's? A. Yes, sir.
Q. Likewise as to the contents of the station wagon, it would be substantially the same as she testified?
A. Yes, sir.
Q. All right, sir. Now as you left there about 8:30, did you follow the route that she stated and outlined here before the jury in your trip to Oklahoma? A. Yes, sir.
Q. Now would you tell us, please, sir, what kind of a station wagon, model and so forth, the automobile was that you were riding in? A. It was a '53 Nash Rambler.
Q. I want to ask you, please, sir, if you had had anything done to that station wagon with respect to -- that had anything to do with its position on the ground from the normal station wagon.
A. I had had three extra leaves put in the back spring. I had been hauling some heavy stuff, and it wouldn't stand

it, so I had the heavy springs put in it and brought up to an elevation of about four and a half inches higher
307] than the average station wagon.

Q. Can you gentlemen hear? Would you please repeat that statement?

A. I said I had three springs put in each back spring, you know, extra leaves, to elevate it, and it elevated it approximately four and one-half inches in height. I also had the coil springs in the front, I had an extra heavy duty coil spring put in there for hauling heavier loads.

Q. All right, sir. Maybe you answered, but what was the purpose for doing all that?

A. Lots of stuff when I'm hauling stuff, we hauled lots of fertilizer to put in our yard. The fertilizer was heavy, it was barnyard fertilizer, and I had those springs put in there so it would hold it up off of the tires.

Q. All right, sir. Now I want you to tell us, please, sir, what type of roads you had from Oklahoma, from the Oklahoma line into -- let me change that question:

Do you remember what town that was just south of Ardmore? A. Marietta.

Q. Marietta? A. Yes, sir.

Q. All right, sir. Tell us what type road you had from Marietta into Ardmore. A. Well, it was an average type road. It was a, you go down inclines and that
308] way, it wasn't -- you see, quite a few varieties.

Q. All right, were there any detours?

A. Yes, sir.

Q. Trace these detours for us in general.

A. Well, we went around -- it said, "Scenic Drive by Lake Murray", and we followed that plumb on until we got to the lake out there, we turned off and went around, we never did stop. It was hot and there was lots of people out there, we never did stop. We just circled around a bunch of trees where there was a drive there and just circled right back onto the highway but never did stop and get out.

Q. Would you tell us what the condition of the traffic was that day after you hit this Highway 77, between Dallas and Ardmore?

A. It was rather heavy, holiday traffic. It was the usual traffic that you see in holiday traffic.

Q. What day of the week was that?

A. That was on Sunday.

Q. Now I want to ask you if you observed, before the accident took place, any type of vehicle following your station wagon. A. Yes, sir.

Q. What type was it? A. It was a bus.

309] Q. Do you know anything about what kind of bus it was, passenger bus or commercial bus?

A. Yes, sir, it was a passenger bus.

Q. And do you remember about when that bus first came, to your knowledge? A. Well, it was--

Q. (Interposing) How far down the road you were?

A. Well, some few miles, seven or eight miles down the road.

Q. From where? A. From where we had the wreck.

Q. Have you had occasion to be over that road since the wreck? A. Yes, sir.

Q. And about how many occasions?

A. About twice, I think.

Q. And during that time, were you conscious of the road and did you observe it? A. Yes, sir.

Q. As you drove along? A. Yes, sir.

Q. Now I will ask you, please, sir, whether that bus passed you at any time from the time it first overtook or came into your vision. A. No, sir.

Q. Tell us, if you know, about how far behind you it

310] generally stayed, from the time that you first observed it?

A. I would say from 150 to 300 feet.

Q. All right, sir. Was the traffic generally heavy both ways that day? A. Yes, sir.

Q. Now who was driving the station wagon?

A. I was.

Q. Who had driven it throughout the trip?

A. I had driven it.

Q. Did your wife ever drive the station wagon?

A. No, sir.

Q. Do you know why? A. She couldn't because it had a clutch on it. My other car had an automatic shift.

Q. All right, what model is this other car you have?

A. It's a '53.

Q. Mr. Shelton, would you tell us, please, sir, what happened on that day when you--

A. Well, what do you mean--what happened to me?

Q. Well, tell us, did an accident occur?

A. Yes, sir.

Q. Where did it occur? A. Right, it was a half a mile south of the city limits of Ardmore.

Q. What was the condition of the highway where it
311] happened? A. Well, there is a little rise there in front of this Chicken in the Rough.

Q. All right, sir. Now did you observe that day before the accident the speed limit that you were permitted to drive in the area, as you drove along? A. Yes, sir.

Q. And what type of signs had you noticed and had you seen and what did they indicate to you?

Mr. Ogden: Your Honor please, I object to what type of signs he had seen and what they indicated to him. Be incompetent, immaterial.

The Court: Overruled.

A. (The Witness) They were, speed limit for daytime driving was 65 miles per hour and 55 at night.

By Mr. Smith:

Q. All right, sir. Before I forget it, Mr. Shelton, was there any "slow" signs or "slow" zones of any type south of where this accident took place, in the area where it took place? A. No, sir.

Q. All right, sir. Now please, sir, let me ask you where the accident took place, pinpoint it if you can.

A. Well, it was right, almost directly in front of
312] the Chicken in the Rough.

Q. All right. Do you see the Plaintiffs' Exhibit Number 1 over here on the board and have you been here through the trial, and I will ask you to tell this jury and the Court whether with reference to where the trooper drew the connecting points there of the automobiles, the accident took place; in other words, is that--is your version of what the trooper drew where the automobiles came together?

A. That's right, about the right position.

Q. Would you tell us, please, sir, when you first saw the Cadillac automobile that collided with your car?

A. Yes, sir.

Q. Would you tell us, please, sir, about the path--come over to the map, please, sir, and just tell us which is north on this map? A. This right here.

Q. All right, sir. Which is east on the map?
A. This right here. (Indicating)
Q. Where is the Chicken Shack? A. Right here.
Q. Now would you tell us, please, sir, about where Mrs. Franklin was when you saw her and about what route she took in her Cadillac automobile after you saw her?
A. She was, when I first saw her, she was right along here. (Indicating) And she pulled down this way and pulled off with the right wheels off of the edge of the pave-
313] ment there, and after she pulled off she ran right around in front of me just like that. (Indicating)

Mr. Ogden: Pardon me, please. It would be all right if he would take a pencil and make a mark there.

A. (The Witness, continuing) She was going when I saw her, she was right along there this way and veered off the highway to the edge like that and just went around in front of me just that way. (Indicating)

By Mr. Smith:

Q. You may return to your seat. Tell us, please, sir, what parts of her car she got off the hard surface slab.
A. She got the right wheels.
Q. The right wheels of her Cadillac? A. Yes, sir.
Q. All right. Were you where you could see the woman in the Cadillac? A. Yes, sir.
Q. Did she make or execute any signs, turn or any signs? A. No, sir.
Q. Did she look in either direction before she pulled to the left across in front of you? A. No, sir.
Q. The position that the cars are now placed in, which were placed by Trooper Williams yesterday, tell us whether or not they represent the condition the auto-
314] mobiles were in generally after the accident.
A. Yes, sir, after the accident.
Q. Mr. Shelton, was there, would you tell us about how far back south of Mrs. Franklin's Cadillac that you were in your station wagon when she shot to the left in front of you?
A. Well, I'd say around 100 feet.
Q. Is that an estimate, or have you measured, made any measurements or anything? A. That's an estimation.
Q. All right, sir. Could it vary some?

A. Yes, sir.

Q. Would you tell us, please, sir, about how far behind you the bus was at that time?

A. He was approximately 150 to 200 feet.

Q. Now would you tell us whether or not there were any automobiles on the east side of the highway about the area where the accident took place, at the time it happened?

A. Yes, sir.

Q. Tell us, as best you recall, about how many; do you have any idea at this time?

A. Well, there was one or two, or more.

Q. What direction were they facing?

A. They was facing in a southwesterly direction.

315] Q. Would you come here and just point about where they were on the map? A. They were about right along about here somewhere, I don't know about the scale of this map here, but they were right along here about four or five feet north, one of them back this way and one right along there. They were both way north of where the accident happened.

Q. What side of the road?

A. They were on the right side.

Q. On the east side of the road?

A. On my right side.

Q. You may return to your seat. Tell us whether or not there were one or more automobiles following the Cadillac automobile down her side of the road.

Mr. Ogden: Object to leading, if your Honor please, leading the witness.

The Court: Well, he said "whether or not".

Mr. Ogden: Yes, that's leading and suggestive.

The Court: Well, overruled.

A. (The Witness) Yes, sir.

By Mr. Smith:

Q. In other words, tell us what you did now, Mr. Shelton, when you first saw this Cadillac automobile circle out and shoot in front of you. A. I applied my brakes.

316] Q. All right, sir. Did you think anything about turning either way? A. I looked to see and I saw it happen so quick that I couldn't.

Q. All right, sir. Did you turn your car either way at the time you applied your brakes?

A. It veered off to the right.

Q. Now why didn't you go, if you had time, why didn't you go to the left around behind the Cadillac automobile?

A. Well, there was two cars coming from behind her.

Q. Why didn't you go to the right?

A. Well, I'd of hit these other cars that was waiting to get on the highway.

Q. Now was that your first time over that area?

A. Yes, sir.

Q. Since then, have you had occasion to see that area?

A. Yes, sir.

Q. How recent? A. Well, last Thursday.

Q. All right, sir. On last Thursday, did you have an occasion while you were there to see if there was any 35 mile speed zone signs to traffic headed north anywhere in the area?

A. Yes, sir.

317] Q. Did you find one? A. No, sir.

Q. Now did you find one between the place where the accident took place and the city limits of Ardmore?

A. Yes, sir, about a fifth of a mile down that way, north of where the, be right south of where the city limits, or where the divided highway starts there, that's where the sign was.

Q. About where the divided highway starts and the single highway ends? A. Yes, sir.

Q. Is that where the sign was? A. Yes, sir.

Q. All right, sir. Will you tell us how far north of the Chicken Shack that sign was, or how far south of the city limits of Ardmore it was? A. It was five-tenths of a mile north of the Chicken Shack.

Q. All right, sir. Now are you telling me that the sign was five-tenths of a mile north of the Chicken Shack?

A. No, sir, the city limits.

Q. That would be a half a mile north? A. Yes, sir.

Q. Of the accident? A. Yes, sir.

Q. Would you tell us how far north of the accident, or

318] how far south of the city limits, this 35 mile speed sign was? A. Well, it was just about a fifth of a mile or two-tenths. I believe it was a tenth of a mile or--

Q. (Interposing) Where? A. South.
Q. South of what? A. The 35 mile zone was south of the divided highway, city limits sign.
Q. All right, sir, the city limits sign?
A. Yes, sir.
Q. Now had you gotten to that when the accident took place? A. No, sir.
Q. If it had been there, would it have been possible for you to have seen it four-tenths of a mile on?
A. No, sir.
Q. Was your station wagon in good condition, so far as you know, at the time? A. Yes, sir.
Q. Would you tell us, please, sir, about how fast you were traveling, or do you know about how fast you were traveling when you first saw the Cadillac automobile?
A. Oh, it would be around 40 miles an hour.
Q. Now I want you to tell us, please, sir, what happened to you when the accident took place, what happened to you personally? A. Well, I--whenever they had to pry the door open to get me out--
319] Q. (Interposing) Mr. Shelton, don't tell in your testimony about what anybody said to you. You just tell me just what happened to you.
A. Well, they had to get my boy off of my back.
Q. All right, sir. Go ahead and tell us -- were you thrown out or not?
A. No, sir, I was laying down on the steering wheel.
Q. All right, did you sustain, what--did you sustain any injuries? A. Yes, sir.
Q. Was there anything about you or about the children that you could tell us that you saw?
A. The first thing that I looked around and saw my wife laying in my arm, back of her head, gushing blood.
Q. Tell us, please, sir, what you did, if you remember.
A. Well, I, they opened the door, had to pry the door open to get us out.
Q. All right, sir. A. So they carried us out there on the pavement and laid us down.
Q. All right, sir. Now would you tell us, please, sir, if you can, describe the condition to the jury that the children were in then? A. Well, the oldest boy, he was--had his head over my shoulder, and was laying
320] down there and the blood was gushing out of his head.
Q. All right, what about the others?

A. The little girl, she was screaming back there and couldn't get out, pinned in.

Q. All right, sir. Anything else about what the children were doing or what you saw at that time?

A. Well, the baby, he was screaming, he was--I looked at him and he was covered up with blood.

Q. All right, sir. Now have you seen the pictures here that were introduced today in evidence of the station wagon?

A. Yes, sir.

Q. I just want to hand that to you and let you look at them and tell the jury then whether or not that represents the condition that you saw the station wagon immediately following the accident. You are first looking at Plaintiffs' Exhibit Number, let's see, Plaintiffs' Exhibit Number 4. Try to compose yourself, Mr. Shelton, and look at this Exhibit No. 4 now.

Mr. Ogden: If your Honor please, I would like to either approach the bench and make a record or have the jury excused.

The Court: Well, approach the bench.

321] (The following at the bench out of the hearing of the jury)

Mr. Ogden: Comes now the defendant and moves the Court for a mistrial in this case, for the reason that the conduct of both plaintiffs, Mr. and Mrs. Shelton, is such that it has brought about a condition that it would not be fair for us to try the case with this jury, Mr. Shelton sitting, with the witness crying loudly and wiping his tears from his face, right now in the presence of the jury, and Mrs. Shelton sitting back here and crying and wiping tears from her face in the presence of the jury, and we know that the jury couldn't try the case without being prejudiced, we think it would not be fair to the defendant to try the case under this circumstance.

The Court: Overruled.

Mr. Ogden: If the Court please, so I might have a record, there is no question but my statement is correct as to the facts?

The Court: No, of course I'm not passing on that. You have made your statement and of course the Court is not going to try to add to it or take anything from it.

(The following again in the hearing of the jury.)

By Mr. Smith:

Q. Mr. Shelton, let me ask you this question, by the way: What education do you have? A. Eighth grade.

Q. Eighth grade. Where did you obtain that?

322] A. Route Springs.

Q. Show us, where is Route Springs, so this jury--

A. That's a little school. It's abandoned now. Don't have school there any more--south of Sulphur Springs twelve miles.

Q. Just a common school district? A. Yes, sir.

Q. Have you any special training other than your barber work? A. No, sir.

Q. And by the way, what year did you and your wife marry? A. In 1938.

Q. Now tell us, please, sir, here are these exhibits--Plaintiffs' Exhibit No. 4--tell us whether, you can answer yes or no, whether or not that exhibit reflects the condition your station wagon was in following the collision.

A. Yes, sir.

Q. All right, sir, and the same question with respect to Plaintiffs' Exhibit No. 3. A. Yes, sir.

Q. Now Mr. Shelton, let me go for a minute, please, sir, and ask you something about the extraction of your tooth in the early part of 1955. Just tell us who pulled your tooth.

A. My doctor, Ben Wood.

323] Q. And where did he live?

A. He lived at Sulphur Springs.

Q. Up until that time, Mr. Shelton, had you had any trouble at all with your body? A. No, sir.

Q. Now tell us, please, sir, what happened following that tooth extraction; did you have any difficulty?

A. Yes, sir.

Q. All right, sir, and how did it affect you?

A. I had a kind of a numb feeling.

Q. Where?

A. In the right side, of my leg and my arm.

Q. All right, sir. And tell us whether or not you

lost any work by virtue of it.
A. Not then, not that first.
Q. When did you?
A. I had then the next, the fourth day from then I had another little spell just about the same way.
Q. You mean the numbness didn't stay with you?
A. No, sir.
Q. Came and went?
A. It hit me there and stayed with me for about four hours.
Q. And the next time it hit you, came to you, was about four days later, three or four days later?
A. Yes, sir.
324] Q. What did you do then? A. I went to see a doctor.
Q. Who did you go to see? A. Dr. Tom Stephens.
Q. Sulphur Springs? A. Yes, sir.
Q. All right, sir. Had you lost any work up until that time from this tooth extraction? A. No, sir.
Q. All right. What did you do following the trip to Dr. Stephens? A. He told me to go home--

Mr. Ogden: (Interposing) I'm going to object, your Honor please, to what the doctor told him.

By Mr. Smith:

Q. Just tell what you did.
A. I went homeand stayed about three hours.
Q. What next did you do?
A. I went back to work.
Q. All right, sir, and did it affect you again?
A. Yes, sir.
Q. About how long afterwards? A. About three days.
Q. How did it affect you then?
325] A. In the same manner.
Q. What did you do then?
A. I went to see a doctor in Winnsboro, Dr. Stewart.
Q. And what did you do then?
A. I went to Dallas.
Q. At whose request? A. Dr. Stewart's.
Q. All right, sir, and who did you see, if anyone, in Dallas? A. Dr. D'Errico.
Q. All right, sir, and what did Dr. D'Errico do, if anything? A. He just ran a bunch of tests.

Q. All right, sir. Were you hospitalized throughout or during that test period? A. Yes, sir.

Q. Did he do surgery on you, Mr. Shelton?

A. No, sir.

Q. By the way, did you tell Dr. Truett James that he did surgery on you? A. He must have misunderstood me.

Q. Now how long were you over at the hospital under the observation of Dr. D'Errico?

A. About four or five days.

Q. Did Dr. D'Errico ever submit you a bill for surgery?

A. No, sir.

326] Mr. Ogden: We object to that. That wouldn't have anything to do with it, whether he sent a bill or not.

The Court: I don't think that has anything to do with the case. Ladies and gentlemen of the jury, disregard the statement that Dr. D'Errico, whatever his name is, didn't send a bill.

By Mr. Smith:

Q. All right, sir, tell us what you did. Don't tell what the Dr. D'Errico told you to do, because that wouldn't be admissible, but tell us what you did when he dismissed you.

A. I went homeon Friday afternoon and I went to work Monday morning.

Q. All right, sir, did he dismiss you? A. Yes, sir.

Q. Now about when was that you went to work, about what day of the month, I mean? A. That was about, I reckon around the 7th or 8th of April.

Q. Of what year? A. 1955.

Q. I want to ask you, please, sir, if you have since that time on up to the present time, had any, felt any effect that affected you, any pain, anything that affected you comparable to the pain that followed the numbness which followed the tooth extraction.

Mr. Ogden: If your Honor please, I am going to object
327] to this on the grounds it's incompetent, irrelevant and immaterial. He says felt any pain "comparable to", so I don't think he is competent to testify on that, the different kind of pain, what it would be comparable to.

The Court: Objection overruled.

A. (The Witness) No.

By Mr. Smith:

Q. The Judge says you may answer. A. No, sir.
Q. Mr. Shelton, so far as you know, had you completely recovered from the disability following the tooth extraction when this accident occurred?

Mr. Ogden: Same objection.

The Court: Yes, overruled.

A. (The Witness) Yes.

By Mr. Smith:

Q. Did you lose any time from your work from the 7th or 8th of April up until the time of this accident?
A. No, sir.
Q. Did you work the same or longer hours a day following it?

Mr. Ogden: Object to it as leading, if your Honor please.

The Court: Yes.

Mr. Smith: Tell us whether or not you did.

328] The Court: All right.

By Mr. Smith:

Q. Tell us whether or not you worked by the day, the number of hours was as long or longer after the tooth extraction as they were before. A. They were the same.
Q. Now would you tell us, please, sir, going back and picking up where we left off awhile ago, and tell us where you went from the scene of the accident.
A. Well, to the hospital, you mean?
Q. Yes, sir, just wherever you went. A. Well, after they got us out of there, they laid me down out there

on the gravel, and the highway, and I was complaining about wanting them to do something for my baby, and so--

Q. (Interposing) Now just tell us where you went.

A. Well, the ambulance came and got us and they carried us to the hospital.

Q. Was that in Ardmore? A. Yes, sir.

Q. All right, sir. Did you see a doctor there in Ardmore in the hospital? A. Yes, sir.

Q. Tell us where you went from there and why.

A. Well, they carried us in the emergency room there,
329] and I was laying beside of my boy, and so I heard--

Q. You can't say what was said.

A. I know, but one of the doctors told me--

Q. (Interposing) Now wait just a minute. You mustn't say what one of the doctors told you. Tell us where you went from there. A. We went to Baylor Hospital in Dallas.

Q. Don't answer this because I don't want to infringe upon the Court's ruling, but did you go from there to Dallas by virtue of instructions from the Oklahoma doctors and as a result of the instructions they gave you?

Mr. Ogden: That's objected to.

The Court: Well, overruled. Go ahead and answer.

By Mr. Smith:

Q. The Judge says you may answer. A. Yes, sir.

Q. How long were you at Ardmore?

A. Two or three hours.

Q. Did all of you go together to Dallas?

A. Yes, sir.

Q. Where did you go when you got to Dallas?

A. To Baylor Hospital.

Q. Would you tell this jury what doctors administered to the children, first, then we will come on down and cover the-- A. (Interposing) Well, we had Dr. Cherry with the oldest boy and Dr. Davis with the youngest one.

Q. All right, sir, and was the youngest boy the boy
330] that had the collapsed lung? A. Yes, sir, and there was some floor doctors there that I don't, never did remember their names but they administered first aid there to the girls.

Q. All right, were all of you admitted to the hospital

there? A. Yes, sir.

Q. Do you know how long you stayed?

A. We stayed five or six days, I think it was.

Q. All right, sir. And then where did you go from there? A. We went home, to Sulphur Springs.

Q. All right, sir. I want to ask you, please, sir, what injuries you received in that accident that you know of, not what somebody told you but just tell us what--

A. I had my head ripped open and I had my arm all mangled up in the elbow, ground up, and I had my nose cut underneath there and my chin.

I had my knees drove into the dash there and it sort of more or less busted my left knee and skinned it and my right one, too.

Sprained this right hand and in the wrist there. It swelled up to where I couldn't even button my own clothes or anything for nine weeks. I had to be waited on just like I was a baby.

331] Q. Now was there anything else that bothered you following the accident? A. My back. I had--well, while I was in the hospital there, in for my arm and all right after the wreck, my back started to bothering me, and it has bothered me continuously ever since.

Q. I want you to tell me, Mr. Shelton, something about when you got home, where did you stay, what position did you have to stay in? A. Well, I had to stay on, slept on my right side in the bed there, and with more or less two pillows under my back.

Q. Was there any type of brace on any part of your body at that time? A. No, sir.

Q. Was there any type of a cast on any part of your body?

A. Yes, sir, there was a big cast on my shoulder plumb on down to the tips of my fingers.

Q. All right, sir. Your deposition was taken in Sulphur Springs, too? A. Yes, sir.

Q. Last summer. Was that at the same time that your wife's depostion was taken to which Mr. Ogden referred earlier in the testimony? A. Yes, sir.

Q. Where were you that day when your deposition was

332] taken? A. I was in the bed there at home.

Q. All right, sir. Now what bothers you now, Mr. Shelton? A. Well, I have just a continual pain up and

down my back all the time plumb into my foot, runs down my left side and my arm here, and this elbow is never free of pain.

Q. Would you tell us whether you have a complete motion, use of that left arm? A. No, sir.

Q. Well, tell us how far you can bend it.

A. I can't bend it but just a little bit.

Q. Show the jury. A. (Witness complies)

Q. All right, sir, you are extending it and also bringing it toward the body? A. Yes, sir.

Q. Now would you tell me, please, sir, whether you have tried to do anything with that arm since this accident took place? A. Yes, sir.

Q. Tell us whether or not you have, in the home, tried to exercise it and make it more movable.

Mr. Ogden: We object to that as leading.

Mr. Smith: Whether or not.

The Court: All right, objection overruled.

333] A. (The Witness) Yes, yes, sir, I have.

By Mr. Smith:

Q. Tell the jury whether you have any improvement in it now over what you had when Dr. Truitt James examined you last February and testified by deposition.

Mr. Ogden: That's objected to, if your Honor please, conclusion which only a medical doctor--

The Court: (Interposing) Overruled.

Mr. Ogden: Exception.

A. (The Witness) No, sir, I haven't.

By Mr. Smith:

Q. In other words, are you able to do anything more with it now than you could four or five months ago?

A. No, sir.

Q. In your profession as a barber, did you use your left hand? A. Yes, sir.

Q. Was it necessary for you to use both hands?

A. Yes, sir.

Q. And have you tried to barber any since the accident?

A. I have cut my boys' hair.

Q. How many times? A. Two or three, tried to.

Q. All right, sir. Can you follow the barber profession? A. No, sir.

Q. Why can't you? A. I can't straighten my left
334] arm up. I can't lift it up to use my comb. I am right-handed. I use the comb in my left hand, and I can't even touch a man's head when he is sitting in the barber chair.

Q. Would you tell us what other work, if any, you have done or tried to do since the accident took place?

A. I have been a grinding some scissors and some clipper blades.

Q. Is that clipper blades and scissor work for other barbers? A. Yes, sir.

Q. All right, sir, have you tried to do anything else?

A. I haven't got any profession or anything like that. I haven't tried to--not anything else that I know that I could do; couldn't hold down a job.

Q. All right, sir. Following this accident, were you under, did you take any medicine or anything to relieve your pain? A. Yes, sir, for some time.

Q. All right, sir. Do you still have to or do you?

A. Yes, sir.

Mr. Ogden: If the Court please, that's objected to if he still has to or not. I think that's medical.

The Court: Well, overruled.

A. (The Witness) Yes, sir, I do.

335] By Mr. Smith:

Q. All right, sir. Do you have any trouble--what time do you go to bed at night?

A. Oh, about 10:00 or 11:00 o'clock.

Q. Well, why do you wait that late?

A. Well, I can't sleep. I just try to sit up and make

the night as short as I can because I can't sleep.

Q. What time do you get up of a morning?

A. Oh, about 7:30 or 7:00.

Q. What do you do when you go to bed?

A. Well, I just lay there and roll.

Q. Do you get up during the night? A. Yes, sir.

Q. Why? A. Well, I can't lay in the one position very long, have to get up, stir around; my back gets to hurting me and my leg, have to straighten it out.

Q. Would you tell us, please, sir, whether there are times when your back and body hurts you worse than others?

A. Yes, sir.

Q. When is that, please, sir? A. Late of the evening, or if I walk any, try to walk, try to stand on it, why I can't stand very long at a time.

Q. I will ask you, Mr. Shelton, if you know, whether or not you know, the prevailing rate of pay for a barber of your experience in Hopkins County, Texas?

336] A. You mean the price of haircuts?

Q. Yes, sir. A. $1.00 and $1.25.

Q. In the three year period preceding this accident, what was your condition with reference to whether you were able to do and did do a full day's work as a barber?

A. What, how do you--will you repeat that?

Q. I will first ask you this: How many hours a day did you work as a barber in your profession before the accident occurred, generally? A. Ten hours a day.

Q. All right, sir. How many days a week?

A. Six days.

Q. All right, sir. Had you always barbered there in the little town of Sulphur Springs?

A. Yes, sir, with the exception of two and one-half years that I was in the Navy.

Q. Now I believe you stated what the prevailing rate was, what they charge for a haircut. A. Yes, sir.

Q. Now in the three years preceding this accident, what was your condition now with reference to whether you were able to and did do a full day's work as a barber, during the three year period before this accident were you able to do a full day's work as a barber? A. Yes, sir.

337] Q. Now in the year of 1954, we will say, first, do you know how much money you made from your services as a barber, about how much? A. For 1954, you say?

Q. Yes, sir. A. I got $8,745.00.

Q. $8,000 - and what?
A. Seven hundred and forty-five.
Q. All right. Now in 1953?
A. 1953, I got $7,752.80.
Q. All right, sir. Now I want to go back to 1954 and ask you again and look at the figure you were looking at there and tell this jury what you made in 1954; you said $8,745.00. A. $7.45.
Q. Tell us again, please, sir. A. $8,007.45.
Q. What year is that? A. That's in 1954.
Q. All right, sir. You gave us 1953. Would you please tell us how much you made in your profession in 1952?
A. $7,147.10.
Q. Now do you have that where, what you made until the time of your accident on July the 3rd, 1955?
A. I've got $3,542.10.

* * * * *

338] Mr. Smith: We pass the witness, your Honor.

The Court: All right.

Cross Examination by Mr. Ogden:

Q. Your Honor please, and you ladies and gentlemen of the jury: May I ask a question or two here about this plat here which has been identified by the reporter as an exhibit in this case, Plaintiffs' Exhibit Number 1, on this easel in front of the jury.

Is that in your opinion a fair representation of the
339] area surrounding where the accident occurred, Mr. Shelton?
A. Yes, sir.
Q. Mr. Shelton, do you know what is between the west side of the paving and the fence? A. Yes, sir.
Q. What is in there? A. White, chalky gravel.
Q. Chalky gravel, something like chat, is that right?
A. Yes, sir.
Q. Would you tell the Court whether or not there is any bar ditches or anything in there?
A. Just a jump-off down that way. It's about, must be about a foot fall from the highway.
Q. From the highway. Would you tell the Court and jury

if it's an asphalt paving between the main paving and that there? A. The asphalt is level with the highway.

Q. Now then, is there grass growing or anything on this side? A. No, sir.

Q. Now then, would you mind to tell us where you were, I think you did, told Mr. Smith where you were, when you first saw the Franklin car, with reference to, we'll say, the Chicken in the Rough restaurant. A. About 150 feet down.

Q. Down the road from that. So then that would be
340] about 150 feet south, would it not? A. Yes, sir.

Q. And saw Mr. Franklin. Now when you saw her you made a mark here with a pencil a moment ago, and I would prefer if you don't mind, it's hardly visible, if you would mind to come and take this pencil and put it where you first saw Mr. Franklin when you were 150 feet south of the Chicken in the Rough--would you mind to do that, please, sir? And make it dark enough and heavy enough so that it will be visible to the jury, please. A. She was coming up along here, going south along this way.

Q. All right, would you make that heavier and darker so that we can-- A. (Witness complies)

Q. Mr. Shelton, now which one of the lines you have made, you have made two here--which one of these is the correct one? A. This one right here.

Q. The first one you made is not?

A. This one here, that's a--

Q. (Interposing) Would you watch me and I'll place that a little darker so you will see. Now that line--would you take the eraser and rub out the one that is not the correct line?

Now then, would you mind, Mr. Shelton, just stand right
341] beside me, please, sir, just so this other juror can see it: at this point here we will put an "X" is that about where she was when you first saw her? A. Yes, sir.

Q. Could I put an "X" there? Now where I have put that "X" right there, that's where she was when you first saw her? A. Uh huh.

Q. Would you tell the jury if you took your eyes off of her, you said she didn't look, didn't stop--did you take your eyes off of her then until she went and made this turn and went over here across the highway in front of you, keep them on her all the time? A. Yes, sir.

Q. You looked at her all the time. Then if you were

looking over here to the west side of the road and at her, watching her do all this, then would you explain to the jury how you could look over there on the east side of the road and see these cars parked over there if you kept your eye on her constantly all the time?

A. The road wasn't that wide. Your eye's focused that way. It don't focus the view right in one spot. You can see.

Q. Now then, would you take this pencil again, please, sir, and mark there where you say the two cars were on the west side, I mean the east side of the road, that were fixing to come into the highway? A. (Witness complies.)

Q. They were there and about how close up to it?

342] A. Oh, I'd say just a safe distance there, maybe four or five feet.

Q. Four or five feet, they were both--were they trucks or cars? A. They were cars.

Q. Did you see them drive up there? A. No, sir.

Q. They were there? A. Yes, sir.

Q. All right, and they stayed there during that entire time, did they? A. I wouldn't know.

Q. But you do know they were there? A. Yes, sir.

Q. Is that right? Okay. Then would you please return to the stand now, Mr. Shelton, if you don't mind.

During that time you also said that the bus was about 150 feet back of you, is that right? A. Yes, sir.

Q. And you were approximately 150 feet south of this Chicken Shack. Now do you know how far it was from the Chicken Shack down here to where Mrs. Franklin was, where this accident happened? A. No, sir.

Q. Would you be able to estimate about how far?

343] A. No, sir, I wouldn't.

Q. Did she pull her wheels off, her right-hand wheels off of the pavement like this? A. Yes, sir.

Q. To the right, and then turn the car back across the left? A. Yes, sir.

Q. Now could you tell whether it was a man or a woman in the car? A. Yes, sir.

Q. What was it? A. It was a woman.

Q. A woman in the car? A. Yes, sir.

Q. A woman. You could tell that by looking down at that distance while you were traveling and she was traveling?

A. Yes, sir.

Q. Now then, you told the jury that she didn't look to the right or to the left and didn't stop her car, is that correct? A. That's right.

Q. Now could you tell whether she was looking or not--you was looking at her to that extent? A. Yes, sir.

Q. Now then, would you explain to the jury how you
344] could see her, if her car--if you would, I just want you to explain to the jury: Just assuming now, if the Court will permit, this is assuming this is the highway right here and this would be north. Now you was going north, weren't you? A. Yes, sir.

Q. And you would be over here on this side of the road, wouldn't you? A. Yes, sir.

Q. She was coming south and she would be over here. If I am correct, you tell me if this is the way you saw it--she was coming up this way, you could see her car and thought it was a woman, and she pulled her right wheels off and she turned the car around and came back over this way and that she did not look.

Now I will ask you how you could see through this car, and she would be on the left-hand side, would she not?

A. Yes, sir.

Q. In other words, she would be on the north side from you? A. Yes, sir.

Q. You would have to see through her car and look over here to see her holding on the wheel on the other side and tell whether she was looking or not; how could you do that and you be driving down the highway and you say this heavy traffic going both directions?

A. There's a more or less broad view of the windshield
345] and the glasses in the car gives you a clear vision. That's the way they build them now.

Q. Was that the way they built them then?

A. Yes, sir.

Q. And you tell the Court, you told your counsel and the jury on direct examination that there was heavy traffic and cars coming behind her, too? A. Yes, sir.

Q. Now then, when she pulled off of the highway to the right, you said there was cars immediately back of her, I believe, and cut her car across; what happened to these cars going south, if they didn't hit her? A. They whipped around on this gravel strip to keep from it.

Q. Oh, there was a car then when she was going, if

she was going here to the south, you were going north, she pulled off this way, and then she cut her car this way, then there was a car coming from behind her, like this, a car coming in behind her, and in order to avoid hitting her, just whipped off on the gravel? A. Yes, sir.

Q. Now was that right. Now did you ever tell anybody that before in your life?

A. That's the way it's been.

346] Q. Sir? A. That's the way it was.

Q. I just asked you if that's not the first time that you ever even claimed that? A. No, sir.

Q. Will you tell us where or when you ever told that before to anybody? A. I told that to everybody that wanted to know how the accident happened.

Q. Well, I asked you some questions about how the accident happened. So this car whipped off on the gravel off to the right to keep from hitting her, what did that car do then?

A. I don't know. That's when we hit.

Q. Well, now you actually saw a whip-off, didn't you?

A. Yes, sir.

Q. On the west side of the road, and go around. Mr. Shelton, I just want to ask you about this particular point, one question--what were you reading from awhile ago about the money you made? A. That was my book.

Q. Well, you mean what kind of book?

A. Book that I kept.

Q. Was it a bank book? A. No, it was my shop book that I keep, kept my daily records, weekly records.

Q. Would you mind if I looked at it just a moment?

347] A. No, sir. Would you hand me those, Mr. Smith?

Mr. Ogden: I won't take but a minute. The one he was looking at, the one he had in his hand when he was up there testifying.

The Witness: Oh, this one. I just took this one down from the record there.

By Mr. Ogden:

Q. Could I see that? A. Yes, sir, you can see this one here and bring that one over there, Mr. Smith, if you don't mind.

Q. Now when did you write this down in this book?

A. Yesterday morning.

Q. You wrote this down yesterday? A. Yes, sir.

Q. Now I believe you said here in your deposition when I took your deposition, just ask you one question--I don't want to take very much time with this: "The Witness" -- this is on page 63 of the deposition:

"Yes, I can do that, I am capable of doing that and that's what I am making.

"Question: Did you take that figure, $8,000, from your books or did you just, did you just have it here at home, didn't go down to your place but you just estimated it; that's what you were making?"

That's my question to you.

348] "Answer: Yes, I know what I make."

Now then, is that, you testified there it was $8,000 and that you took it from your books? A. Yes, sir.

Q. But that was not correct, was it, Mr. Shelton?

A. That was a guess there.

Q. That was a guess.

A. I couldn't remember the exact figure but I told you approximate.

Q. That's all right, Mr. Shelton. Just let me ask you also if I may: You were going at the time of the accident, you was going about how fast?

A. Around 40 miles an hour.

Q. May I ask you, a Dr. Davis, you said, was a doctor for one of your boys, was he not?

A. No, sir--yes, sir, baby boy.

Q. Sir? A. The baby boy.

Q. He was a doctor for one of your boys, I said, is that correct? A. Yes, sir.

Q. In Dallas. Now have you seen Dr. DeRico since you came back from the hospital in Dallas in April, we'll say the 6th day of April, whatever it was, 1955, before

349] the accident in July? A. Yes, sir.

Q. You came back. You have been back to see him since that time? A. Yes, sir.

Q. For treatment? A. Yes, sir.

Q. Did you say that Mrs. Franklin was driving slow or fast? A. She was driving what you would call slow.

Q. Slow? A. 10 miles an hour.
Q. And you were in plain view? A. Yes, sir.
Q. You say she was going 10 miles an hour?
A. Approximately, I would; approximately 10 miles an hour.
Q. Then you tell the Court that traveling at the rate of 10 miles an hour she traveled from this point and off the pavement and across to this point and across over here in front of you by the time you traveled 150 feet, and you was going 40 or 45 miles an hour? A. Yes, sir.
Q. Is that correct? A. Yes, sir.
Q. How many feet did she travel, how far south--how
350] far north of this place was she where you made this "X", how far was that?
A. I wouldn't know how to judge that.
Q. Well, you have been back, you said, since that time, have you not? A. Yes, sir.
Q. A couple of times. You don't have any idea. Could you give the jury an estimation of it?
A. No, sir, I couldn't.
Q. Was this car that you said was parked over here on the side fixing to come into the highway at this point here where you made the two marks, I'll will ask you if that car was not up here where the wreck happened. A. No, sir.
Q. Well, now how could this space here about right--isn't that 37 feet between this sign out here in front and the edge of the highway, and about 76 feet, I believe he has it marked here, 32 feet more than from the end of this sign up to the restaurant--now you had all this space in here, didn't you? A. Yes, sir.
Q. Nothing to obstruct you there. Then over here you also had 25 or 30 feet over on that side, didn't you, that there wasn't any obstruction on? A. Yes, sir.
Q. You said that your car, you had been hauling
351] fertilizer in it? A. I had.
Q. And the springs were weak? A. No, sir.
Q. Well, you had to have them fixed?
A. Yes, sir.
Q. Sir? A. Yes, sir.
Q. Is that right, and your brakes were likewise defective were they not? A. No, sir.
Q. I will ask you when you set the brakes there, there were marks there that totaled 66 feet on the pavement?
A. Yes, sir.

Q. And that it veered off to the right. I will ask you if the wheels, if the brakes, if the brakes didn't, when you put the brakes on if they didn't pull the car to the right.

A. No, sir.

Q. Now you stayed in the hospital in Dallas after the wreck, you got there the evening of the 3rd and you left on the 8th, is that correct? A. Yes, sir.

Q. A period of five days, the first time. Now then, when you left the hospital, did you go home in an ambulance or did you go in a car? A. In two cars.

352] Q. Two cars. You and your family went home in automobiles to Sulphur Springs? A. Yes, sir.

Q. A distance of about how far?

A. About 80 miles.

Q. When you left Sulphur Springs the day of the 3rd of July, 1955, you left at about what hour? A. 8:30.

Q. Do you know, Mr. Shelton, how far it is from Sulphur Springs to south of Ardmore where the accident occurred?

A. About 150 miles.

Q. Do you know? A. Yes, sir.

Q. The mileage on that? A. Yes, sir.

Q. Through McKinney and Denton and other towns?

A. Yes, sir.

Q. And was the traffic, you said it was heavy that day?

A. After I got to, later on in the day.

Q. Yes, sir, and you stopped and ate down the road?

A. Yes, sir.

Q. About what time did you arrive at the scene where the accident happened, if you know?

A. I believe it was around a little after 1:00 o'clock,

353] 1:00 or 1:15, somewhere along there.

Q. How long had you stopped down at the roadside park on the Oklahoma side when you stopped to eat?

A. Oh, twenty or twenty-five minutes, I'd say.

Q. Had you stopped at any other place that day?

A. No, sir.

Q. Do you know where you first saw the bus when you--was it after you left Marietta, when you--when did you first see this bus yourself? A. After we come back on the, off the detour, you know, after--

Q. Sure. For the information of the jury, at that time when you left Marietta there was a detour on account of the fact they was repairing the regular 77 Highway, were they not? A. Yes, sir.

Q. And you went around here what we call a scenic route near Lake Murray; would you tell the Court and jury if you know whether that came back onto the main highway then at Overbrook, about Overbrook there?

A. State that again, please.

Q. Well, you didn't stay on the scenic route or detour all the way from Marietta to Ardmore, did you?

A. No, sir.

Q. About how far south of Ardmore was it that you came
354] back on the main Highway 77?

A. It was seven or eight miles.

Q. All right, sir. Now then with reference to that point, where did you first see the bus driver?

A. About, well, after we made that long hill there, there wasn't a hill--there was a turn in the road, and then after it straightened out for a long stretch there, it was just a slope way down there before you get to the railroad, why I noticed this bus.

Q. Then that was before you got back on the main highway? A. I think that was, I believe that was on the main highway.

Q. I thought you said it was before you crossed the railroad.

A. Along right in there. I don't remember just exactly.

Q. Anyway, the highway, as you know, runs north and south, does it not, 77 Highway from Ardmore to Dallas?

A. Yes, sir.

Q. So this road that you went on looped around by Lake Murray and came back and hit the highway down there?

A. Yes, sir.

Q. About seven or eight miles south of Ardmore, and then from there on you was on the main highway coming into Ardmore; that's where you were when the accident happened, is that correct? A. Yes, sir.

Q. All right, sir. The bus had been following you--
355] how did you know the bus was following you?

A. I looked in my rear view mirror.

Q. Did it ever pass you? A. No, sir.

Q. Did any other car ever pass you? A. I don't know.

Q. If they do, do you have any knowledge of it?

A. No, sir.

Q. If they did, rather, I should say. Now Mr. Shelton, I'd like to ask you if you stopped, you say you stopped nowhere except at these, at this place to eat, and about what

average speed would you drive that day from Sulphur Springs to Ardmore where the accident happened?

A. You want my top speed, average top speed?

Q. I just would like for you to tell me about what speed you drove, about the average speed you drove that day.

A. Well, I wouldn't know how to average it. Sometimes I was driving 10 miles an hour through a town, or less than that, and then about 40 or 45 out on the highway where it was open.

Q. Anyway, 40 to 45 on the highway, and sometimes 10 miles through a town--that's the way you drove from Sulphur Springs, a distance of 150 miles with these stops, and you went through some towns, rather large towns, did you not, that had red lights and stop signs and things like
356] that, like Denton, Texas, McKinney, Texas?

A. Yes, sir.

Q. And what's that other town besides McKinney?

A. Greenville.

Q. Greenville, Texas, and even, of course, leaving the town that you left which is Sulphur Springs, that's about 10,000,too, isn't it? A. Yes, sir.

Mr. Ogden: If your Honor please, I would like to make out of the presence of the jury a tender of some proof that I would like to ask him, but I don't believe that your Honor would rule it was--in view of the motion that your Honor sustained.

(Proceedings at the bench out of the hearing of the jury)

Mr. Ogden: If this witness were permitted to testify, he would testify that this car that was driven on this occasion was owned by he and his wife jointly, was acquired with community property funds, that they are residents of the State of Texas under the community property laws, that the car was jointly owned, that the funds used for the trip was funds of both, that they were on a joint mission, and using joint money and a joint automobile.

357] The Court: Yes, just a second. You make your offer?

Mr. Ogden: Yes.

The Court: You are not saying that the title was in the wife, you are just saying that on account of the community property laws of the State of Texas that she had an interest in it, is that right?

Mr. Ogden: I am just making a statement of the true fact that it was jointly owned by them, purchased with community property funds.

The Court: I know, but it wasn't in her name?

Mr. Ogden: Judge, I didn't ask him that. I was just going to make this offer of proof.

The Court: All right, you make the offer and he objects.

Mr. Smith: Yes. Let me say if I may, so far as the Texas law is concerned, when this man purchased his automobile and takes it in his name, if it is purchased by community property funds, of course it is considered community property, but that is Texas law. Of course we are not trying this case under Texas law. We are trying it under Oklahoma law where the accident took place, and the title to the automobile was in Mr. Shelton and he would so testify if he were asked.

Mr. Ogden: I just make this tender.

358] Mr. Mountcastle: Will you agree that it was in his name?

Mr. Ogden: No, I won't agree. I am just telling the Court that I am not in a position to ask him because you said it wasn't proper.

The Court: All right, you make your tender of proof and the Court sustains the objection.

(The following again in the hearing of the jury)

By Mr. Ogden:

Q. Now I will ask you if you gave your deposition in

this case on the 16th day of August, 1955, at your home, before Jack G. Scott, official stenographer reporter, Upshur, Wood County, Texas, with your lawyer present and me present, and I asked you certain questions; you remember that, do you not? A. Yes, sir.

Q. Now then, I want to ask you with reference to the youngest child, the boy, if he was not laying on the bed sound asleep on that occasion, and that Mr. Smith here picked him up and carried him out of the room and took him to another room and laid him on the bed and he didn't even wake up. A. Yes, sir.

Q. You remember that, this boy that was so bad off. Now then I will ask you if this question was asked you, and this answer, these answers given, and I am on page 21 of the deposition:

359] "Question: Was anyone immediately behind you or immediately in front of you, that you know of?

"Answer: Well, from Marietta, where you are talking about, a bus followed me."

Did you give that answer? A. Yes, sir.

Q. Was that true, or did the bus just catch up with you after you got back to the main highway?

A. That's the first time I'd ever been up there. I didn't know where the towns were or anything.

Q. Then, did it follow you from Marietta like you said in this deposition? A. No, sir.

Q. It did not.

"Question: All the way?

"Answer: Might near all the way.

"Question: Do you know what bus, what company it was?

"Answer: No.

"Question: Was it a public transportation bus?

"Answer: Yes.

"Question: Followed you, would you say practically all the way from Marietta to Ardmore, the bus stayed behind you; is that correct?"

Your answer: "Yes."

Were those questions asked and those answers given by you when you gave that deposition? A. I guess so, yes, sir.

360] Q. Sir? A. I guess so, yes, sir.

Q. "Question: Did it ever pass you before the accident?
"Answer: No, sir.
"Question: When was the first time you noticed the bus behind you?
"Answer: Right after I came back. I made this loop in front of the lake and drove around up there, and it was so hot and all we never did stop, and I came on back to the highway, and after I came back on the highway I noticed in my rear view mirror this bus was following me.
"Question: Did that bus ever pass or attempt to pass you?"

And your answer is: "No."

That's correct, is it not? A. Yes, sir.
Q. Page 22 of the deposition, I'll ask you if this question was asked and this answer given when this deposition was taken:

361] "Question: Now then, can you tell the Court and jury the terrain, that is, the kind of country it was say a mile before you got to the scene of the accident, whether it was level, flat country, or hilly?
"Answer: It was fairly level country and all.
"Question: I beg your pardon?
"Answer: It is fairly level country at Ardmore, what you would call level. It's not hilly country as well as I remember."

Did you give that answer? A. Yes, sir.
Q. I will ask you if at that time you didn't contend that it wasn't hilly there at all, just flat level country.
A. No, sir, I didn't.
Q. You didn't.

"Question: You say, as well as you remember, for at least a mile south of the accident, it wasn't hilly, is that right?
"Answer: I don't think so.
"Question: Was it a level road?
"Answer: Yes, sir, I think it was."

Was that your testimony then? A. Yes, sir.

Q. That it was a level road, that's the way you viewed it. You say now it was a level road? A. Fairly level.

Q. Level, fairly level, you state that at this time?

362] A. That's right.

Q. I want to ask you if you don't know as a matter of fact, since you have been back and looked at that, that from the top of this hill, crest of this hill, immediately before the accident happened down to the bottom of it, from the direction from which you came, it's 10 feet and 7/10 of a foot higher at the top of the hill than it was at the bottom of the hill? A. I didn't measure it.

Q. But did it look that way to you? A. No, sir.

Q. It didn't.

"Question: Were you about a hundred yards from her, do you think, or more or less?"

That question I asked you on the deposition--"Were you about a hundred yards from her, do you think, or more or less?"

Your answer: "Around that, I guess."

Now you know how many feet a hundred yards is, don't you?

A. Yes, sir.

Q. How many? A. 300 feet.

363] Q. 300 feet.

"Question: Around that, is that your best judgment?"

Your answer is: "Yes."

Now you tell the jury today you was 150 feet away, is that correct?

A. I misunderstood that there in yards and feet.

Q. Oh, you just made a--then you say that you thought I was talking about feet there when I said yards?

A. Yes, sir.

Q. All right, then. Would you tell the jury--you said 100 yards, you think it was 100 feet, is that what you said?

A. Around that, yes, sir.

Q. Then a moment ago you told the jury it was about 150 feet; which is correct, please, sir, 100 yards or 150 feet or what, do you know?

A. I wouldn't know exactly, but it's in between.

Q. In your best judgment--you have given us your best judgment, have you, Mr. Shelton?

Now I will ask you--I'm reading from page 27 of the deposition--this is referring, I'll read you back of it if you want me to, but referring to Mrs. Franklin, but without the whole thing you probably wouldn't know. You said--this is the question:

"Question: You said she went off onto the west side
364] of the road which would be your left-hand side?"

Your answer:

"That's correct."

You said that in your deposition. The next question:

"And you saw her drive off and make a circle, is that right?

"Answer: Yes, sir."

Did you give that answer? A. Yes, sir.

Q. That you saw her drive off the road and make a circle. Did she ever stop or slow down?

A. I wouldn't think so.

Q. I'll ask you these questions, I'll ask you several and let you answer if they are right or wrong, if you will tell me, please, and save that much time:

"Question: Did she pull over to the right?

"Answer: Yes.

"Question: Did she get off the paved part of the highway?

"Answer: Yes, she got her right wheels off of it.

"Question: She got her right wheels off the paved part of the highway?

"Answer: Yes.

"Question: And then turned to the left" -- Page 28 --

"-- And then turned to the left in front of you, is that right?

"Answer: Yes, sir.

365] "Question: And you saw her do that, did you not?

"Answer: Yes.

"Question: When you first, and when--the first time you saw her she was going south; that is before she turned off?

"Answer: Yes, sir.

"Question: Then she turned off and got her right wheels off the highway, off of the paved part of it and circled back to the left of you, is that correct?

"Answer: Yes, sir."

Now up to there did you give that testimony in Sulphur Springs when I took your testimony? A. I guess I did.

Q. Sir? A. (Nods affirmatively)

Q. Is it, in your opinion, correct?

A. Yes, sir, it is, I guess it is.

Q. "Question: Now then, when you saw her circling
366] back in front of you, did you apply your brakes?

"Answer: Yes, sir.

"Question: Did you turn your car either to the right or to the left?

"Answer: No, sir, I didn't.

"Question: Why didn't you?

"Answer: There was a car meeting me.

"Question: There was a car meeting you?

"Answer: Yes, coming from the north following her.

"Question: There was a car following her?

"Answer: Yes.

"Question: If she was between you and the car from the north, how could you see this car from the north if she was there in front of you, how could you see?

"Answer: How many cars could you see lined up; couldn't you see more than one car?

"Question: Was she between you and the other car? I thought you said she was.

"Answer: Yes, sir."

Were those questions asked and those answers given?

A. I guess they were.

Q. Sir? A. Yes, sir.

367] Q. Now then, would you tell the Court, and when this car coming from the north you said ran off to the right out there, what happened to the other car behind it, what did it do? A. It went back around behind her on the gravel strip over there that I told you about.

Q. How many cars, if you know, were behind Mrs. Franklin?
A. I don't know.
Q. Do you know of more than one? A. No, sir.
Q. Could you see more than one?
A. I didn't have time. It was done in a split second. I didn't have time to count them.
Q. If you saw more than one you don't have any knowledge of it? A. Yes, sir.
Q. Is that correct? A. That's right.
Q. "Question: How could you see back of her and see another car coming?
"Answer: I could see four or five cars and so could you."

Did you give that--you just got through telling the jury now you only saw one car and in the deposition you said you saw four or five cars, if I understood you correctly; is that correct?
A. I was giving an illustration how many cars you--
368] Q. (Interposing) Now Mr. Witness, I have just read this to you and you just told the jury, as I understood it a moment ago that you saw one car behind Mrs. Franklin.
A. Yes, sir.
Q. Going the same direction that she was going. Now I read you this deposition here, I said, "How could you see another car coming?"
"I could see four or five cars and so could you.
"Question: I just asked you if you knew how you were able to see if her car was between you and the other car; did you look over it or what?"

I was trying to find out, Mr. Witness, how you saw it. I thought you said that her car was between you and the other car.
"Answer: Behind her."

That was your answer:

"By Mr. Ogden:

"You saw a car coming from behind her?
"Answer: From behind her."

So my question still was:

"How could you see that car, was her car between you and the other car?

"Answer: Yes, sir, it was back this way."

Did you give that answer? A. I guess I did.

Q. Now then, answer without any further question:

369] "I could still see over her car. I could see from behind that car when she made her sway to the right. I could see another car behind her. I could see four or five cars, as far as that goes."

Were there four or five cars behind her?

A. I said that was an illustration.

Q. Oh, it was an illustration.

"Question: When she pulled over, when she pulled her car to the right, that would be to the west side of the highway?

"Answer: Yes, sir."

Did you give that answer? A. I guess I did, sir.

Q. Now I want to ask you on page 32 of the deposition, beginning on line number 5, this question:

"Question: Her car was in front of you, wasn't it?

"Answer: Her car was in front of me. This car was coming on back yonder, way back yonder, before she made her zigzag around her. I could see cars way back up yonder."

Now that's in your deposition, I believe, and is that correct or incorrect, or was the car right behind her and ran off the pavement like you just told us; which is right,

370] which is correct, please, sir?

A. I--will you ask the question, I don't understand it.

Q. Let me read this to you and I am reading on page 32 of the deposition where this question was asked you and this is purportedly your answer:

"Question: Her car was in front of you, wasn't it?"

Now your answer:

"Her car was in front of me. This car was coming on back yonder, way back younder before she made her zigzag around there. I could see cars way back up yonder."

A. Well, that's still in the illustration there, that's what I was trying to get at.

Q. Did you give this testimony, please, were these questions asked you and those answers given you on August 16th?

A. Yes, sir.

Q. Thank you. Now on page 33 of the deposition, I will ask you if this question was asked you and this answer given:

"Question: When she pulled the car out in front of you, you didn't try to go either to the right or the left, did you?

"Answer: No, sir."

Is that correct? A. Yes, sir.

Q. "Question: You could have gone either way, couldn't
371] you?

"Answer: No.

"Question: I will ask you if you don't know on the right-hand side there is a big opening between her car and the cafe, gravel shoulder road?"

Now then was that question asked you at that time?

A. Yes, sir.

Q. Now you just told the jury, I want to be positive, that this car down here, that there was two of them and they were down here, and they were north of this cafe right here north, and would you be able to estimate about how many feet--you told us once but I have forgotten, if you would mind, please, Mr. Shelton, to tell us again?

A. I wouldn't know how far.

Q. As far as from here to the jury? A. I wouldn't know. It happened so quick I wouldn't know how many feet.

Q. You saw those cars down there, though?

A. Yes.

Q. All right, sir. Now let me read you this and ask you, please, sir, if it is correct. I will read this question to you again:

"Question: I will ask you if you don't know on the
372] right-hand side there is a big opening between her car and the cafe, gravel shoulder?"

Then your answer:

"A car coming right out of that filling station, right on the north side, the reason I didn't pull right into his face.

"Question: There was a car coming out of the filling station?

"Answer: Out of the filling station.

"Question: Up above where the accident happened?

"Answer: Right where the accident happened. He was coming down there waiting to get into the highway when the traffic cleared up. He was coming out of this filling station.

"Question: You tell the Court there was one coming out of the filling station and on the east side there of the road, the same side you were on, and on the gravel waiting to come into the highway, is that correct?

"Answer: Yes, sir."

Now was it right where the accident happened, like you testified here? A. Approximately in the vicinity, right by it.

Q. Sir? A. You remember we stopped the deposition
373] on account of my pain?

Q. I didn't ask you--I just ask you now, now I'd appreciate it if you would just answer the question, if you don't mind.

A. That's the reason it was balled up in there.

Q. Balled up, you say? A. Had to have a recess.

Q. I just asked if you gave that answer and you stated you did or did not. A. Yes, sir.

Q. Sir? A. Yes, sir.

Q. You said in the deposition that there was one car and it was right at the place of the accident. Now you say that there was two and they were north, is that correct?

A. That was when we stopped the deposition.

Q. Now Mr. Witness, if you will just answer my question, I will deeply appreciate it. I just say that's the way you testified then? A. I guess I did, yes, sir.

Q. Now I'm reading on page 35, beginning on line 6, by me:

"Question: If you didn't say that, tell us where this car was coming from.

"Answer: He was trying to get on the highway, right even where the wreck happened."

I will ask you if you didn't so testify and that's the reason

you couldn't turn off. A. Yes, sir.

Q. He was right even with where the wreck happened, one car.

"Question: There was a car there trying to get on the highway, and he was up close to the highway, is that correct?

"Answer: That's correct.

"Question: How close to the highway was he?

"Answer: He was very close.

"Question: And how close to where the accident took place?

"Answer: Right at it."

Now did you testify that, to that on the 16th day of August?

A. Yes, sir.

Q. At Sulphur Springs, Texas, with your lawyer present. Now I want to ask you if you would tell the jury where Mrs. Franklin's car was when your car hit it, your car hit the side of her car, didn't it? A. Yes, sir.

Q. And would you tell the jury with reference to the pavement where her car was and where your car was at that time that you hit her car? A. Her car was nearly in the center of the highway. Her car would take up the full width of the highway there and she was right on,

375] straight across the highway.

Q. Straight across the highway?

A. At an angle, angled this way, but what I mean, it was taking up almost the width of the highway.

Q. Well, was there any part of her car off of the pavement and on the east side over on the gravel?

A. I wouldn't think so until it was hit.

Q. Until after it was hit. So now then where this patrolman, put this here, where the skid marks run up here, according to this patrolman who drew these pencil marks right here, one of the skid marks itself went clear off the pavement here--when it hit her car, he says that's the way he found the skid marks, and the debris. You tell the Court and jury that is not correct, that all her car was back up over here on the pavement, do you not; you have just testified to that, haven't you? A. I believe he stated that it was right at the edge of the highway.

Q. Well, here's the drawing. Pardon me, Mr. Witness, I don't want to argue with you or confuse you, but I believe

if I remember correctly that this is a drawing that the highway patrolman made himself with his own hands, isn't it?

A. Yes, sir.

Q. And you can see here there is part of her car clear
376] off the east side and here is your skid marks coming in here and one of the skid marks running off there; is that right or wrong? A. I imagine it was stopped just about at the edge of the pavement.

Q. You just told the jury a moment ago that all of her car was on the pavement, and in the center of the pavement, didn't you? A. Until it was hit.

Q. Until after it was hit?

A. Yes, sir, and the impact knocked it around there.

Q. Well, you hit the car here, skid marks went to her car, didn't they? A. I imagine they did, yes, sir.

Q. And then you heard the highway patrolman testify to that, anyway, didn't you? A. Yes, sir.

Q. And that the debris and glass was all over there on the ground. Now I will ask you if this question was asked you on the deposition:

"Question: Now then, when your car struck Mrs. Franklin's car, which way did your car turn?

"Answer: As well as I remember, it just headed straight north."

Did you give that testimony? A. Yes, sir.

Q. Is that correct or incorrect?

377] A. Well, it is pretty well correct, yes, sir.

Q. "Question: Do you know whether her car was off the pavement, any part of it was off the pavement on the east side?

"Answer: I don't know.

"Question: You don't know.

"Answer: Hers, as well as I remember, was right in the middle of the highway."

Did you give that testimony when you gave your deposition that her car was sitting in the middle of the highway when you hit her? A. Yes, sir.

Q. Was that correct? A. It was correct, yes, sir.

Q. You heard the highway patrolman testify?

A. Yes, sir.

Q. All right, sir, I will read to you from page 38:

"Question: The last time you saw her car, Mr. Shelton, before the cars hit, where was her car?
"Answer: She was right in front of me.
"Question: Was her car off the pavement?
"Answer: Right straight across in front of me.
"Question: Would you say what part of it was on the
378] west side of the road and what part of it on the east side of the road, would you say that part of it was on the west side of the road and part of it was on the east side of the road?
"Answer: Well, I would say it was right in the center just about as near as you can get one of them."

Did you give that answer in Sulphur Springs when your deposition was taken? A. Yes, sir.
Q. That was where Mrs. Franklin's car was when you hit her.
"Question: About as near as you could get the car in the center of the road is where she was?
"Answer: Yes."

Did you say that? A. Yes, sir.
Q. "Question: So then you hit the front part of her car, is that right?
"Answer: Yes.
"Question: And you were on the pavement when you hit?
"Answer: Yes."

Did you give that testimony? A. Yes, sir.
Q. "Question: Had you tried to turn your car either way?
"Answer: No, sir, I didn't."

379] That's on page 39. Was that your testimony?
A. I imagine it was.
Q. Now I will ask you if on page 42 of the deposition this question was asked you and this answer given by you:

"Question: Mr. Shelton, could you tell us when you saw this car, the other car, we will put it, which was the car referred to as the defendant's car, Mrs. Franklin's car--could you see it was a woman driving the car?
"Answer: Yes, sir.
"Question: You saw that when you first saw the car,

could you tell that?
"Answer: Yes, sir.
"Question: Before she even turned across?
"Answer: Yes, sir."

And that is what you testified to and that is correct, is it not? A. Yes, sir.

Q. "Question: No bar ditch there to keep from turning off. Now then there is one other question I don't think I asked you: About how fast were you going when you got in sight of Mrs. Franklin's car the first time you saw her car, about what speed were you traveling?
"Answer: Between 40--around 40 and 45.
380] "Question: Around 40 or 45 miles per hour?
"Answer: Uh huh.
"Question: Then when you saw her cut across you tried to stop, didn't you?
"Answer: That's right.
"Question: Is that correct? Now did you see any buildings at the right-hand side of the road south of where this accident happened, immediately south there, were there any buildings along there that looked like part of a town, stores, filling stations?"

Your answer: "Uh huh."

Were those questions asked you and those answers given, Mr. Shelton? A. Yes, sir.

Mr. Ogden: Your Honor please, there is one of these on June the 6th and one in August.

The Court: The trouble with all of these depositions, as I see it, you have got, you repeat so much.

Mr. Ogden: Yes, sir.

The Court: You have got two or three repetitions there and this one that you have just read. If that other one is repetition of this last one.

381] Mr. Ogden: If your Honor please, I am trying to get only those that I think are competent.

I will ask some other questions while he is finding that, if your Honor please.

By Mr. Ogden:

Q. Mr. Shelton, do you drive an automobile now?
A. Yes, sir.
Q. You own an automobile? A. Yes, sir.
Q. You owned two when the accident happened, did you not? A. Yes, sir.
Q. You had a driver's license at that time?
A. Yes, sir.
Q. Now then, after that time and after this accident, and after you went home on about August the 3rd, 1955, which was the same year that you had the accident, you applied for and received another driver's license, is that right?

Mr. Smith: If the Court please, we are going to object to this line of questioning regarding any driver's license that he applied for after the accident occurred because we don't believe it has any bearing on the case. We didn't object to it on the part of Mrs. Shelton but it is nothing that has any part in this case, immaterial and irrelevant. He is asking about an application filed after the accident.

382] The Court: Well, overruled.

By Mr. Ogden:

Q. All right, the Court said you may answer.

The Court: Do you have a driver's license?

The Witness: Yes, sir.

By Mr. Ogden:

Q. Did you secure that, I didn't--ask you some leading questions--did you acquire that after the accident in August, 1955, didn't you? A. No, sir.
Q. When did you get it? A. I got the application thirty days prior to the accident. It's two years, whenever they expire they send you thirty days notice, and I sent it in while I was in the hospital.

Q. After the accident? A. Yes, sir.
Q. Is that right. A. But it was already, we had already fixed it out, it was before the accident.
Q. Did you report the accident? A. No, sir.
Q. Now Mr. Witness, I will ask you if it isn't a fact that when you made this application for this driver's license, you had the application, you filled it out, mailed it from down at where you lived, down at Sulphur Springs, Texas, and you got your license somewhere in August,
383] 1955? A. Yes, sir.
Q. And you did not report or mention this accident or your disability which you have been telling the jury about, did you? A. They don't require it.

Mr. Smith: Your Honor please--

The Court: (Interposing) Just a minute, I'll sustain the objection to that. There is no proof here that he has to report it. You are assuming something. Ladies and gentlemen, don't consider that question and answer with regard to whether or not he notified the Department of Texas as to his accident when he secured his license in August, 1955.

By Mr. Ogden:

Q. I will just ask you this question: Have you ever reported this accident to any public body, either Oklahoma, Texas, or any other official body?

Mr. Smith: Now your Honor please, we are going to--

The Court: (Interposing) That's immaterial. That has nothing to do with the case.

Mr. Ogden: May we approach the bench?

The Court: Well, no, it doesn't make any difference
384] whether he reported it. If he hasn't reported it, he might be legally liable, and if he hasn't reported it, I don't know. Of course it doesn't show anything whether or not this man was injured or whether he was negligent or whether the other party was negligent.

Mr. Ogden: Well, if your Honor please, I wouldn't state my reason here in the presence of the jury. I don't believe it would be proper, but at some other time if the Court has the time I will make my statement at that time, but no use taking up time now. I don't want to be in the attitude--

The Court: All right.

By Mr. Ogden:

Q. Do you drive now? A. Yes, sir.

Q. When you were in the hospital, I believe you told us that you left Dallas, came home with your family to Sulphur Springs on the 8th of July, and the other time you went back you just went back up there in a car, did you not?

A. No, sir.

Q. Now Mr. Witness, I sent to your lawyer for answers by you with reference to certain questions, and I will ask you if you answered those questions with the advice of your lawyer in his office and if he typed them up for you, those interrogatories I sent you; do you remember anything about that? A. No, what--?

Q. Well, interrogatories.

385] Mr. Smith: We will stipulate that we answered the interrogatories, they were typed out in my office and we mailed them in.

Mr. Ogden: If your Honor please, the copy I have here is not marked. I don't want to take up any more time. I have my copy here somewhere marked, but it will take awhile to find it.

If your Honor please, if I find anything I can re-ask them. At the present time that's all I desire to ask him.

Mr. Smith: I have one or two questions, your Honor.

Redirect Examination by Mr. Smith:

Q. There are questions here pertaining to this that weren't asked you in the deposition and that might add some further light to the jury. I want to refer to page 53 of

of your deposition taken in August, and I want to read you this question.

Mr. Ogden: If your Honor please, may I object to these questions and these answers regardless of what they are because the only thing that I am permitted to do is ask him if he gave a certain question and a certain answer for the purpose of impeachment. Now that's all. Now he is purporting to start in and take the same deposition which
386] is highly improper.

The Court: Are you going to read the questions and answers that you asked him, Mr. Smith?

Mr. Smith: That I asked him?

The Court: The Court will sustain the objection.

Mr. Smith: I just wanted to ask him--

The Court: No, now wait a minute.

Mr. Smith: All right, sir.

By Mr. Smith:

Q. Mr. Shelton, have you lost, do you weigh as much as you did when the accident took place? A. No, sir.

Q. Well, about how much difference is there in your weight now and when the accident took place?

A. About thirty pounds.

Q. About thirty pounds? A. Yes, sir.

Q. All right, sir. Do you know what you weigh now?

A. I weigh about 131.

Q. Mr. Shelton, you answered in response to one of Mr. Ogden's questions earlier in your testimony that you had been back to see Dr. D'Errico since the accident. I want to ask you why you went back to see him, please, sir.

A. Dr. James sent me to him.

387] Q. All right, sir, what did he do when you went back to see him?

A. He put me in physical therapy.

Q. Now I want to ask you, please, sir, if you know the length approximately of a 1953 Cadillac automobile from

bumper to bumper of the type that collided with you on the 3rd of July, 1955. A. It's between 18 and 20 feet.

Q. Do you know the width of this hard surface highway where you collided? A. Yes.

Q. How wide is it? A. It's 20 feet.

Mr. Smith: Pass the witness, your Honor.

Recross Examination by Mr. Ogden:

Q. I just want to ask you one question, if I may: When you went to Dallas to Dr. D'Errico and went in the hospital in March before the accident in July, would you please tell this Court and jury whether or not you were given a general anesthetic and put to sleep? A. Just local.

Q. Sir? A. A local, through the arm.

Q. You were never unconscious?

388] A. Not very long at the time.

Q. Well, I didn't ask you if you were a long time. I just asked you if you were unconscious, if you were given something to put you to sleep, make you unconscious.

A. I went to sleep.

Mr. Ogden: You went to sleep. Thank you.

Redirect Examination by Mr. Smith:

Q. Mr. Shelton, I will ask you this question: From the time you left Dr. D'Errico on the 7th or 8th of April, 1955 until the date of the accident, did you go back to see him? A. No, sir.

Mr. Smith: That's all.

The Court: All right, step down.

(Witness withdraws)

The Court: Call your next.

Mr. Smith: If the Court please, plaintiff rests its case.

Mr. Ogden: I would like to make some motions out of the hearing of the jury.

(The following out of the hearing of the jury)

Mr. Ogden: Comes now the defendant and moves the Court to instruct the jury to return a verdict in favor of the defendant and against the plaintiff --

The Court: Overruled.

389] Mr. Ogden: Comes now the defendant and moves the Court to instruct the jury to return a verdict, or for the Court to return a judgment in favor of the defendant, in favor of the defendant as to the plaintiff, I'll have to get that boy's name, to be sure -- Larry Shelton -- is he the one? -- Robert Shelton. There is no evidence of any kind, not one hint of medical evidence as to anything wrong with him.

The Court: Overruled.

Mr. Ogden: Comes now the defendant and moves the Court to instruct the jury to return a verdict in favor of the defendant as to the plaintiff Venera Shelton for the reason that there is not one line of medical proof in this case that she was ever injured in any respect.

The Court: Overruled.

Mr. Ogden: Exception, if the Court please.

Now then, the two girls, the names I'll have to get -- comes now the defendant and moves the Court to instruct the jury to return a verdict in favor of the defendant as to the plaintiff Anita Shelton for the reason that there is no testimony that directly or indirectly, medical evidence or otherwise, that she had any injury or damage of any kind, and nothing to support it.

Comes now the defendant and asks the Court to instruct the jury to return a verdict in favor of the defendant against the plaintiff Pamela Shelton as to the cause of action
390] brought in her behalf, as alleged for and on her .

behalf -- the same is true as to each one of these children -- for the reason that there is no evidence, competent evidence to support a verdict of judgment in favor of the plaintiff in behalf of the said minor children.

The Court: Overruled.

Mr. Ogden: Exceptions.

R. C. BATES, called as a witness on behalf of the defendant, testified as follows:

Direct Examination by Mr. Ogden:

Q. Would you mind, please, sir, will you state your name, age and post office address?
A. R. C. Bates, age 58, 712 3rd, Southwest, Ardmore.
Q. What is your trade, occupation or profession?
A. Civil engineer, surveyor.
Q. Are you so licensed by the State of Oklahoma?
A. Yes, sir.

Mr. Ogden: You admit his qualifications?

Mr. Smith: Yes, sir.

By Mr. Ogden:

Q. And you are the county engineer and surveyor of
391] Carter County? A. Yes, sir.
Q. How long have you been the county engineer and surveyor of Carter County? A. 25 years next month.
Q. 25 years next month. I will ask you if, at my request, you went out to a place where it's commonly referred to as Chicken in the Rough, south of Ardmore, Highway 77, along in that area, and made out there a drawing to scale so you could determine scientifically the elevations on that highway. A. Yes, sir.
Q. Would you tell the Court and jury whether you made also a correct description, that is, according to size and distance from the highway, of the various buildings and locations of the highway and the general improvements on the highway? A. I did.

Q. Do you remember how far you made that along the sides of the road, for a period of how far?
A. 2846 feet, I believe.

Mr. Ogden: Will you let this be identified, please, Mr. Reporter, as Defendant's Exhibit No. 4.

(Defendant's Exhibit 4, being drawing, was marked for identification.)

By Mr. Ogden:

Q. Mr. Bates, I will hand you Defendant's Exhibit No. 4, and ask you to look at that and tell the Court if you know what that is. A. This is a print of the drawing that I made of a survey.
392] Q. Now I am going to hand you these other things here which I have, and ask you --

The Court: (Interposing) Let the Clerk identify them, mark them, please, sir.

Mr. Ogden: All right, sir.

If you don't mind, I'll hand all these to the Clerk so we will be sure to get the original one. Is that made from the original?

The Witness: Yes.

Mr. Ogden: What you have in your hand?

The Witness: Yes.

By Mr. Ogden:

Q. Would you find the original in this group for me, please sir?

What I have in my hand, is that the original or is this the original? A. That's the original.
Q. This is the original. Then would you identify the original.

(Clerk marks for identification the original of the drawing mentioned heretofore.)

By Mr. Ogden:

Q. Now Mr. Bates, so that the Court and jury and op-
393] posing counsel understand it, did you first make one without the width of the buildings on there?
A. Yes.
Q. And then you were requested to put the buildings, put them on there too? A. Yes.
Q. And that's the reason for having two, is that correct? A. Yes, sir.
Q. Just alike except that. Now this exhibit here is called Exhibit No. 5, Defendant's Exhibit. Would you tell the Court and jury if this is an original drawing?
A. Yes.

(The original of the drawing was marked by the Clerk as Defendant's Exhibit No. 5)

By Mr. Ogden:

Q. And would you tell the Court and jury if one you have on your lap, in your hand there, or your person, is a copy of this original drawing. A. Yes.
Q. Just alike, except you made this first and that from this. A. Yes.
Q. Now will you tell us whether or not these plats and drawings and scales were made either by you or under your supervision and direction? A. Yes, sir.
Q. Is that right. How did you make them, with the
394] instruments, you used proper instruments?
A. Yes, sir.
Q. Yes. Now on here, I am going to hold up this here and I will ask Mr. Mountcastle just to assist me -- let's put this to the north. Which way would be the north? Is that pointed north now? A. Yes, be upside down.
Q. Would you mind holding that, Mr. Mountcastle?

Now then, Mr. Bates, if you will stay there he can see these things, then everybody, I think, the jury can see it, and we will pass it up in a few minutes.

This exhibit then, Defendant's Exhibit No. 5, that Mr. Mountcastle and I are holding on the easel, that is the original drawing, is that correct? A. Yes.

Q. Now then, this line up here, which I will point to right now -- A. You have it upside down, Judge.

Q. Wait, I want to get this right. I want to get it so it will be -- can you come up and point this north just like this was north up this way -- can you do that so we can have it right? A. You can't point it north without it being upside down.

Q. You can't point it north without it being upside
395] down. I didn't think you could -- that's the reason. Well, this is pointed -- that's north, isn't it?

A. That's north.

Q. But actually in the court room here, that's south. Well, then you can go back to the stand then.

So then this arrow points to the north, and assuming now that this is actually north, while it is actually south here in the court room, makes no difference -- this is north.

Then, would you tell us like beginning here at the south edge where it says "Station 0 plus 00, begin Survey"; what does that mean?

A. That means the point where I started surveying.

Q. You started surveying there, and then you went up here to a point where it says "28 plus 46, end of Survey". You surveyed that whole thing now, is that right?

A. Yes.

Q. Would you tell us whether or not you determined the elevation on the highway itself, of the paved part of the highway, during that survey up there? A. Yes.

Q. And so you could tell how high any point in the highway, how much higher it was than any other point?

A. Yes, sir.

Q. Now what do these figures right down here at the bottom of this drawing, down at the bottom here like the first one I find here, says "850". Now what does that
396] mean? A. That was the assumed elevation of the center line of the pavement.

Q. Assumed elevation; well, why did you assume it?

A. So you could give a difference between the elevation of that and other points.

Q. Yes, so you took that as a base to start with?
A. Yes.
Q. And then you could tell how much higher or lower the other points up and down were. All right, sir.

Now then, the next one then, I'll just use this one here, skip a bunch and won't take up time -- how far are these two numbers apart, these stations? A. 100 feet.
Q. All right, sir. Now the next one says 849.5, the first one is 850. Does that mean there is a half a foot drop beginning down there by the first station, from the next hundred feet going toward Ardmore, going north, is that right?
A. Yes.
Q. Now, would you tell us -- on up, and gives you the drop on each one clear on up, is that correct? A. Yes.
Q. Now would you tell us where the lowest point is, the lowest point on this area here, this half a mile, beginning down here at what's called a golf driving range.
397] Was there a golf driving range there? A. Yes.
Q. And is there one there now? A. Yes.
Q. And that's where you started this point, and this was approximately a half a mile long, is that right?
A. A little over half a mile.
Q. A little over half a mile. Now where is the lowest point on this place shown on this plat?
A. The lowest point is at station 13.
Q. Station 13, and what is that, how high or low?
A. 828.6.
Q. 828.6? A. Yes.
Q. Now then, would you tell the Court and jury if you know, what is opposite that down here on the highway, 828.6, what's opposite that right on the highway, what building?
A. It's 26 feet north of a residence.
Q. Well, do you know where the Veterans Hospital is, and a sign "Dig Kennel"?
A. You mean the veterinary hospital?
Q. Yes, veterinary. A. The veterinary hospital is 1232 feet from the beginning of the survey.
Q. All right, sir. Where is it with reference to
398] 828.6 there; that's what I am asking, that station?
A. That's 828 feet from the beginning of the survey.
Q. You don't understand me. Where is the veterinary hospital with reference to the station we are talking about, the lowest point? A. 432 feet north of the 828.6.

Q. Mr. Witness, would you -- this says 828.6. Now if you run that right up here that, there is, if you run it right up here this is the hospital right here. Would you come down here and let me show you? Maybe I can make myself clear to you.

You see the hospital here, veterinary hospital, then you see 828.6 right there. A. That's right.

Q. Now where is this hospital with reference to that point 828.6? A. That would be 68 feet north.

Q. All right, sir. Return to the stand, so we can put it in the record.

Then the lowest point shown on this plat, which is 828.6, was 68 feet north of the veterinary hospital alongside of the highway? A. Yes.

Q. Is that right, that's the lowest point. Now let's
399] take up the highest point to the north, traveling north like Mr. Shelton was, going from south to north.

Then when you arrived at that point, now you tell us where the next highest point on the north is from that.

A. Highest point?

Q. Yes. A. At station 25.

Q. Station 25. Now where is station 25, how high was it? A. 838.7.

Q. 838.7. All right, sir, where is that with reference to the cafe in question? A. What is it?

Q. Where is that with reference to the cafe, that Alvin's drive-in, Chicken in the Rough cafe?

A. 185 feet south of the south edge of the cafe.

Q. All right, sir. Now would you tell the Court then how much the difference in the elevation at the bottom of the hill to the south and the top of the hill as shown by this plat, in feet; at any rate, how much lower it is down at the bottom of the hill than it is at the top, in actual measurement? A. 10.1 feet.

Q. 10.1 feet, is that right? A. Yes.

Q. So at the bottom of the hill you ar 10.1 feet
400] lower than you are when you get to the top going north, is that right; then when you get to the top going north, will you tell the Court and jury whether or not the slope starts downgrade again, if you know? A. Yes.

Q. Sir? A. Yes.

Q. Now then, from the top point, highest point to the farthest point north that you made, will you tell us how much the difference in that is, like you would be going to the nor h, going over the hill and starting down; tell us how much the fall is there. A. 4.4 feet.

Q. How much? A. 4.4 feet.

Q. 4.4 feet of drop in how many feet on the pavement, going north after you go over the top of the hill?

A. 346 feet.

Q. All right, sir. Now will you tell the jury, if you know, how wide the concrete paving is? A. 20 feet.

Q. Then would you tell us up there near the cafe, and around the cafe involved here, Alvin's Cafe, how far it is from the edge of the highway to the cafe, like from the edge of the highway out to the cafe?

A. From the edge of the highway?

401] Q. Yes, sir. A. 92 feet.

Q. 92 feet. How far is it from the edge of the highway to the sign in front of Alvin's Cafe -- I am assuming a fact not in evidence, but is there a sign there?

A. Yes.

Q. How far is it from the edge of the pavement out to the sign in front of the cafe? A. 38 feet.

Q. All right, sir. Then how far is it from the sign to the cafe? A. 54 feet.

Q. All right, sir. Are you able to tell the Court and jury if these indications put on here are correct? In other words, I'll take one for example and won't ask you about all of them.

For instance, here is where it says "Veterinary Hospital", and on here is "114", the figure 114. What does that mean, if anything? A. 114 feet?

Q. Yes, sir. A. It's the distance from the center line of the pavement to the edge of the building.

Q. To the edge of the building. That would be from the center of the pavement, so the pavement is 20 feet wide, you would take 10 off if you was going to measure it

402] from the edge, is that right? A. Yes.

Q. Now then, up here on this map, I notice this has "37 by 30" around this veterinary hospital there. What does that mean -- 37 across in front or 30 down one side?

A. That means the building is 37 feet long along the road and 30 feet long east and west.

Q. In other words, whatever is put in front of it, like it says "Sales Barn" here, 80 one way and 60 another way, that means it's 80 feet wide, is that correct?

A. Yes, sir.

Q. And 60 feet down the other side where you see these figures like that.

So now is there any other -- I notice something here with reference to sign; how do you indicate on this plat, if any way, about signs, advertising signs?

A. I made a circle and put a line through it for a sign.

Q. All right, sir. Did you indicate how far the sign was back from the road? A. Yes.

Q. And that's shown on here? A. Yes.

Q. So if you see a circle with a line through it, that means a sign, and how far back the sign is. Now then, Mr. Bates, could any person with the explanation you have
403] given here, could you take this plat right here and tell how much higher any particular point is on it by just taking the figures and subtracting one from the other?

A. Yes.

Q. Subtracting the smaller from the larger and you have that.

Now Mr. Bates --

Mr. Ogden: Now we offer, if your Honor please, this exhibit in evidence.

The Court: Let it be admitted.

(Defendant's Exhibit 5 was received in evidence.)

The Court: What number is that?

The Clerk: No. 5.

The Court: Defendant's Exhibit No. 5 is admitted. Go ahead.

Mr. Ogden: Then the one you have in your hand has been identified and we will offer it. It's exactly like this, made from this, just for the convenience of anybody, if you need two of them we will just offer it all for that purpose.

The Court: All right.

(Defendant's Exhibit 4, print of Exhibit 5, was received in evidence.)

404] By Mr. Ogden:

Q. Now then, Mr. Bates, would you tell the Court and jury whether or not at my request you went out to the scene of this accident, at least out to where Alvin's Cafe is along here; you are familiar with that, are you not?

A. Yes.

Q. Can you tell us how far it was from the edge of the pavement over to the fence; can you look at that and tell us? A. 50 feet.

Q. All right, sir. Now would you tell us what, if anything, is in here from the side of the pavement over to the fence, on the west side there; what is there in there, if anything? A. Just a parking area with trucks and cars parking to go to the cafes.

Q. Is that level, smooth, does it interfere with the --

A. There's a small drainage, it isn't a dith. It's just a low point to drain the highway.

Q. No ditch -- it's just a regular -- can you drive over it? A. Yes.

Q. Can you tell the Court whether it's been driven over?

A. Yes.

Q. All right, sir. Now then, Mr. Bates, would you tell the Court whether or not you, at my request and in the presence of the sheriff of Carter County, went out to this scene sometime to make some tests and observe it?

A. Yes, I did.

405] Q. Was that after you made these sketches here which you offered in evidence? A. Yes.

Q. Now what did you do, if anything, in order to make tests there to determine how far you could see or could not see a car approaching? A. I parked my car in the parking area opposite the front of Alvin's Cafe with the sheriff in the seat beside me, and I told him to watch the cars coming up the hill, and call time when he could see them, and to call time when it passed by my car.

Q. Now do you remember what kind of car that was you were sitting in? A. Nash Statesman.

Q. No, Pontiac, in your car. A. Pontiac.

Q. All right, sir, would you tell us with reference to this cafe right here, and I am leading you some, are you right over opposite the cafe? A. Yes.

Q. And headed east just off the pavement, is that right? A. Yes.

Q. Now would you tell us then, looking to the south, 406] which would be to your right, wouldn't it, if you were at that location? A. Yes.

Q. You'd be looking to your right. Would you tell the Court and jury when a car first came in sight, come up over the hill, coming to you, from the time it first came into sight until the time it arrived in front of where you were sitting, how many seconds was it?

A. 8 seconds.

Q. 8 seconds. Now did you test more than one car?

A. I think we checked two.

Q. Now are you able to tell the jury about how fast in your opinion -- I'll ask you first, in order to qualify you, have you driven cars? A. Yes.

Q. For a great number of years? A. Yes.

Q. Are you fairly able to look at cars traveling and judge the speed fairly well, fairly accurately?

A. Yes.

Q. Sir? A. Yes.

Q. Now then, what in your opinion, about how fast were those cars coming that when you saw it, in eight seconds it was right there on you?

A. My judgment would be between 55 and 60 miles per 407] hour.

Q. That would be your opinion about it, is that right?

Now then, how long would it take, if you are able to figure it, a car going at 45 miles per hour to come up over that hill and look, wouldn't see anything, then it would be on you, at 45 miles an hour -- if you can figure that, can you figure that up and tell? A. At 45 miles an hour?

Q. Yes, sir. How long would it take it to -- if this other one was parked here, if this other was going, you said 50, 55 or 60, whatever you said, make a comparison there, he will be going slowe.. A. At 45 miles an hour, a car will travel 528 feet in 8 seconds.

Q. At 45 miles an hour it will travel 528 feet in 8 seconds? A. Yes, sir.

Q. Well, if a car going 45 miles an hour, if a car

coming up there took 8 seconds, to one going 50 miles an hour or whatever number of miles you said a moment ago, then going 45 miles an hour it would take more time after you saw it to get there, would it?

A. Yes, 45 miles an hour speed would be slower.

Q. Take a little more time. About how much more time, if you know, if you are able to figure that?

Would you pardon me, if the Court doesn't mind, may I
408] ask all you jurors if you are able to hear his testimony?

All right.

A. (The Witness) You want me to figure it on 60 miles, or 55?

Q. Well, I understood you to say a moment ago in your testimony that you were sitting right there actually and looked when the car first came in sight, and in 8 seconds it was right there; is that right? Right where the accident happened.

Now then, I asked you a question -- you said -- I said about how fast in your opinion was that car going, and what did you say? A. Between 55 and 60 miles.

Q. All right, between 55 and 60 miles an hour, take 8 seconds to get there in your opinion.

Now if it was going 45 miles an hour, it would take more time to get there, would it not? A. Yes.

Q. All right, sir, about how much more time is what I asked you to figure, so if one was going 45 you would know about how long it would take you.

A. Take 2 seconds longer.

Q. Now Mr. Bates, can you take any given rate of speed in an auotmobile and figure yourself, without referring to any table or anything else, figure out at a given rate of speed how far the car will go in a second?

409] A. Yes.

Q. Is that right. Will you tell the jury how many feet a car will travel in one second going 60 miles per hour?

A. Well, at 60 miles an hour a car will travel 88 feet in one second.

Q. One second. Going 45 miles an hour, how fast, how

far will it travel in one second? A. 66 feet.

Q. 66 feet. You have figured that and you know that is correct? A. Yes, that's correct.

Mr. Ogden: That's all.

Cross Examination by Mr. Smith:

Q. Mr. Witness, did you use a vertical and a horizontal scale in the drawing of your map? A. Yes.

Q. What was your vertical scale, what vertical scale did you use? A. Vertical scale in the lower part of the plat is one inch to 10 feet.

Q. One inch to 10 feet. Now what do we mean by vertical, what do you mean by that? A. Straight up.

Q. Straight up and down. What horizontal scale did
410] you use? A. One inch to 100 feet.

Q. One inch to 100 feet. In other words, you didn't use the same scale for your horizontal measurement as you did for your vertical measurement, did you? A. No.

Q. All right, sir. Therefore, the rise which you testified to which is reflected on the map which counsel here has referred to as a hill, does not accurately picture the rise that is in that road as it truly exists, does it?

A. Yes.

Q. Does it? A. Certainly does.

Q. Why didn't you use the same scale then, please, sir?

A. Well, if I platted 2806 feet on an inch to 10 feet, I'd have a map across this room.

Q. But it would reflect, from the standpoint of the distance, the map you used here, it does reflect to the average eye, to the human eye, the ten times difference in the scale you used, reflects a difference in vision to the human eye, doesn't it? A. Yes.

Q. It would if you had used a map long enough, to have used the same scale -- doesn't it? A. Sure.

Q. Now then, Mr. Witness, will you tell me: I believe
411] you said you were sitting in Mr. Ogden's car on the west side of the highway looking south, when you observed this car that you made the measurements from, coming from the south; am I correct? A. Yes.

Q. All right, sir. Now you were off the highway, were you not, that is you were off the slab? A. Yes.

Q. Over onto the slope? A. Yes.

Q. To the west of the slab. All right, sir. Now did you make any measurements, please, sir, of the distance that you could see looking south from that automobile where the accident occurred, as to how long it was? A. No.

Q. You didn't do that? A. No.

Q. All right, sir. Now that highway slopes from center to east and west, does it not? A. Yes.

Q. And by you sitting over on the west side of the highway off the surface, you were therefore -- you can't see as far south, a car coming, as you could if the car was up on the hard surface, could you, looking south?

412] A. No, sir.

Q. That's correct, isn't it? A. Yes.

Q. Now you have referred, please, sir, if I understood you correctly in your answer, to Mr. Ogden's question, to a place there west of where the accident took place as a parking area? A. Yes.

Q. Is there any signs there to that effect?

A. No.

Q. There is no sign there? A. No.

Q. In other words, it's a place where trucks drive off sometimes and park, walk across the street, and eat?

A. That's right.

Q. And that is the only thing that it's used for, isn't it? A. That I know of.

Q. People driving over there and stopping, and walking across the street and eating?

Mr. Ogden: If your Honor please, in view of that statement, it makes the testimony competent about the general use of the area around there.

The Court: I am not going to let you go into that question.

413] Mr. Smith: I just have one other question, your Honor.

The Court: All right.

By Mr. Smith:

Q. Mr. Witness, I hand you here a photograph which has been marked Plaintiffs' Exhibit No. 6, please, sir. I will ask you to look at it and see if you identify the picture

or the area covered, rather, see anything in that that looks familiar? A. Yes.

Q. All right, sir, what would you say that reflects, please, sir; is it a picture of the area where you described it in your drawing here? A. Part of it.

Q. A part of it. It shows an area there then from the Bell Service Station, doesn't it? A. Yes.

Q. And it shows the area where the Chicken in the Rough restaurant is, doesn't it? A. It may be in the background, but it's not here in the foreground.

Q. All right. What building can you definitely identify there? A. The filling station and --

Q. What filling station is that?

414] The Court: Can you folks hear him back there?

By Mr. Smith:

Q. Is that the Bell Service Station or the Phillips 66?

A. It's called the Bell.

Q. Bell. Please, sir, could you tell us from your drawing how far the Bell Service Station is to the south of the Chicken in the Rough Shack?

A. 272 feet from the south edge of the Bell filling station to the south edge of Alvin's Cafe.

Q. Now, please, sir, I want you to look at this picture, the west side of the highway there, and take this eye-glass if you need it, and see what that sign says that's posted there, that sets up there on the highway, please, sir; tell the jury.

A. (Reading) "Do not park on shoulder."

Q. Thank you, sir. How far south would you say that sign is of where the accident is reported to you to have occurred? A. I don't know.

Q. Well, would you look at it again then and give us your estimate of how far the sign is either to the south or north of the Bell Service Station, or where it is with reference to the Bell Service Station?

Mr. Ogden: If the Court will pardon me, Mr. Smith, we have a picture in our deposition that shows that sign completely, it's location and everything.

415] Mr. Smith: You may offer it.

By Mr. Smith:

Q. Would you answer my question?
A. What was the question?

Mr. Smith: Will you read it back to him?

(The reporter reads the question.)

A. (The Witness) As near as I can judge, the sign is opposite the Marrs Implement Company.

By Mr. Smith:

Q. All right, sir, and about how far is that then from the place where the accident took place?
A. 438 feet between the south edge of the Marrs Implement Company office and the south edge of Alvin's Cafe.

Mr. Smith: That's all.

Mr. Ogden: Stand aside, if you would, Mr. Bates.

We offer those exhibits in evidence.

One question I want to ask you, I remembered offhand:

Redirect Examination by Mr. Ogden:

Q. Do you remember, in your approaching from the south, do you remember in front of this golf course down here that you have set out on here, coming up from the south, from that point to the bottom of that hill, that's going from the south to the north now, how much elevation, how far you go down there, do you remember? A. Well --
416] Q. Would it take you much time to tell us?
A. The difference in the elevation of the highway five feet south of the north edge of the golf driving range and the low point, is 20.9 feet.
Q. 20.9 feet, that much higher when you start down the hill. That's all. You may stand aside.

Recross Examination by Mr. Smith:

Q. Mr. Witness, the drawing here that you have submitted and has been introduced in evidence of yours, begins with the area how many feet north of where the accident took place?

A. I don't know where the accident took place.

Q. All right, sir. How many feet north of the sign in front of Alvin's Chicken in the Rough?

A. From there to the end of the survey?

Q. Yes, to the north.

The Court: Well it's to the south, from that cafe south, from that survey south.

Mr. Smith: Yes.

The Court: You said north.

Mr. Smith: In other words, I just want to know where he began his survey.

417] The Court: South of the Chicken Shack?

Mr. Smith: No, just north. He goes south.

The Witness: I began the survey at the south and worked north.

By Mr. Smith:

Q. Then how far did you stop north of Alvin's Chicken in the Rough? A. 143 feet.

Q. 143 feet. All right, sir. Now did you tell us how far that golf course is from Alvin's Chicken in the Rough restaurant to the south? A. 2612 feet.

Q. 2612 feet. Is that -- what part of a mile, half a mile? A. Just a decimal under half a mile; a half mile, 2640 would be a half mile.

Q. Then if the accident happened right in front of the Chicken in the Rough, it would be approximately a half a mile, the golf course would be a half a mile to the south?

A. Yes, sir.

Q. Now you told me your drawing ended 100-and some-

thing feet north of the Chicken in the Rough?
A. Yes, sir.
Q. How many feet south of that did you begin?
A South of the Chicken in the Rough?
Q. South of where you ended your survey.
418] A. 2846 feet.
Q. In other words, your survey covered a distance of 2800 and how many feet? A. Forty-six.
Q. Thank you, sir. Just one minute; how many feet?
A. 2846.

Mr. Smith: That's all, your Honor.

Mr. Ogden: That's all.

* * * * *

Recross Examination (Continued) by Mr. Smith:

Q. Do you know Mrs. Minnie Franklin, the defendant in this lawsuit? A. Not until this trip.
Q. Not until this trip. Do you know Mr. Howard?
A. Yes.

The Court: What difference does that make?

Mr. Smith: Sir?

419] The Court: What difference does that make?

Mr. Smith: Thank you, your Honor.

The Court: All right, step aside.

(Witness withdraws and is excused.)

ENOCH C. WATTERSON, called as a witness on behalf of the defendant, testified as follows:

Direct Examination by Mr. Ogden:

Q. Would you tell the Court your name, age, and post office address? A. Enoch C. Watterson, W-a-t-t-e-r-s-o-n,

Ardmore, Oklahoma, Carter County.

Q. Do you hold any official position in Carter County at this time? A. Yes, sir, sheriff.

Q. The sheriff, and how long have you been sheriff of Carter County? A. I was elected for my third term.

Q. You are elected now for your third term?

A. Yes, sir.

Q. Now then, will you tell the Court whether or not at my request you went with Mr. Bates, the engineer who just left the stand, out to a place called Alvin's Chicken in the Rough south of Ardmore on Highway 77, some month or
420] two ago? A. Yes, sir.

Q. Now then, would you tell the Court and jury what you did out there, if anything, on that occasion with reference to seeing when you could first see a car coming over a hill, approaching from the south?

A. We clocked two or three automobiles.

Q. Where did you sit or where did you stand, or how did you -- where were you when you clocked them?

A. We sat in an automobile, where the accident occurred.

Q. Now then, if this is Alvin's Chicken in the Rough, and I am leading -- if you object, please stop me -- because it's improper, except to save time; but this is Alvin's Chicken in the Rough. Was your car parked here and headed to the east? A. Yes, sir.

Q. And you was sitting here, and looking to see when a car, when you first could see a car coming up over the hill, is that right? A. Yes, sir.

Q. Now then, could you tell us, sitting there, in seconds, how many seconds after you saw a car come over the hill, till it was even with you? A. 8 seconds.

Q. That's all. Do you know how fast -- were you able
421] to estimate about how fast those cars were going that took 8 seconds to get there even?

A. I'd say a normal rate of speed. I couldn't just say how fast they were.

Mr. Ogden: That's all.

Cross Examination by Mr. Smith:

Q. You don't know anything about the wreck, do you?

A. I didn't actually see it happen.

Q. All right, sir; didn't investigate it?

A. No, sir.

Mr. Smith: That's all.

(Witness withdraws)

JAMES R. VERNON, called as a witness on behalf of the defendant, testified as follows:

Direct Examination by Mr. Ogden:

Q. Would you tell the Court and jury your name, age and post office address?

A. James R. Vernon, 29, Box 1853, Ardmore, Oklahoma.

Q. What is your trade, profession or occupation?

A. Veterinarian.

Q. How long have you so been?

422] A. I have been in Ardmore two years.

Q. All right, sir; where is your place of business, your hospital, veterinary hospital?

A. About 1002 Commerce Street, South Commerce Street.

Q. Where would that be with reference to Highway No. 77, going south out of Ardmore?

A. It's right on the highway.

Q. Right on the highway. Do you know where this place commonly referred to in this trial and in these pleadings as Alvin's Chicken in the Rough restaurant, do you know where that place is? A. Yes.

Q. And Doctor, during the last two years, will you tell the Court about how often you have had occasion to visit that place? A. On an average of about twice a day.

Q. About twice a day. What is your purpose in going there, Doctor? A. Eat, get coffee.

Q. About how far is your place from the Chicken in the Rough restaurant, and what direction?

A. Half a mile to the north.

Q. North. You are actually in the city limits yourself, are you not? A. Yes.

Q. And this is outside the city limits. Now then,

423] Doctor, in going down, as you go down to this place to eat and you are going to the north, you would go down Highway 77, would you not? A. Yes.

Q. Then when you arrived, you would be going to the

south, would you not? A. Yes.

Q. Your place is to the north of it? A. Yes.

Q. Then you'd be going down here on the west side of the road, would you not? A. Yes.

Q. Then Doctor, would you tell us then how you got across over to this place going south, on the west side of the road?

Mr. Smith: We believe, if the Court please, that infringes on the Court's ruling.

The Court: Yes, sustained.

Mr. Ogden: I don't believe that it does.

The Court: It doesn't make any difference how he got across. What somebody else does wouldn't have a thing in the world to do with it.

Mr. Ogden: I was just going to ask him then --

Mr. Smith: We object to --

424] By Mr. Ogden:

Q. Mr. Witness, I will ask you then, if you were there, therefore, having traveled there on that many times, the different occasions that you testified about, Doctor, and then are you familiar with the surroundings of the terrain and where the paving is and where the cafe is and things of that kind? A. Yes.

Q. Are you? Now then, Doctor, do you know what is between the highway --

The Court: Well, you have proved that by a number of different witnesses.

Mr. Ogden: Just for the record, then if your Honor please the record could show then that everybody would admit he would so testify to the same thing. That would save going over that with the doctor and save me asking you questions.

Thank you, Doctor, and that's all.

The Court: All right, Doctor, you are excused.

Mr. Smith: Doctor, thank you, no questions.

(Witness withdraws and by agreement of the parties is excused.)

The Court: All right, we will excuse the jury until 9:30 in the morning.

Ladies and gentlemen, don't talk about the case among
425] yourselves or permit anyone else to talk to you about it.

(The jury withdraws from the hearing of the Court and the attorneys.)

(The following out of the hearing of the jury)

Mr. Ogden: If the Court please, I would like to make what I think is a proper record on presentation of tender of proof.

Comes now the defendant Mrs. Minnie Franklin and tenders and offers to prove by Floyd Randolph, who was the sheriff of Carter County, Oklahoma, for eight years, and has a place of business known as the Randolph Saddle Shop, factory, near to the place involved where the accident occurred here, and who has for ten or fifteen years constantly been over that, this same place, and who knows and would testify if permitted to do so by this Court, that it is now and has been for fifteen years a common practice of the public generally to drive across the highway at the point involved in this wreck, that is, opposite Alvin's Cafe, on Highway 77 south of Ardmore, from both east and west, and it's what would be commonly called a turn-around or drive-around, both sides of the road at that point; and that the Highway Department of the State of Oklahoma in recognition thereof has graveled or used chat or some substance clear out to the fence on the west side of the road and clear over to Ione's Cafe some 80 or 90 feet on the east side of the road, and
426] that condition prevails there for a space there of about 400 feet, and that any person driving up to that point can see that there is a public place where people

drive from both sides of the road at various times; and while there is not a highway continuing either east or west from that point, but it is in the nature of a crossing.

Now so Mr. Randolph would so testify, if he were permitted to do so.

The Court: The plaintiffs object, and custom doesn't fix it so that you can violate the law, you know, Judge. You've got to follow the law. It doesn't make any difference what somebody else is doing wrong. That, I don't believe, gives you license to go out and violate the law.

Mr. Ogden: Thank you.

Now if your Honor pleases, so I can make my record, I guess if they object to that tender of proof, the Court sustains the objection.

The Court: You object to it, do you?

Mr. Smith: Yes, sir.

The Court: Sustained.

Mr. Ogden: Now then, if your Honor please, the same tender of proof with reference to Enoch Watterson, the sheriff of Carter County.

The Court: He'd testify to the same thing.

Mr. Ogden: He would testify to the same thing.

427] Mr. Smith: To which we object.

The Court: Sustained.

Mr. Ogden: And Mr. R. C. Bates, the surveyor who was on the stand would so testify. He has been a surveyor there for 25 years, and testified he is familiar, that he would testify substantially the same set of facts as I have just outlined.

Mr. Smith: Object to them all.

Mr. Ogden: Then there is one other thing, if your Honor please, Dr. Vernon, I believe is the last witness named, was on the witness stand a minute ago. He has a place of business and he would so testify, and that the highway patrolman, his name was Anderson --

The Court: Williams?

Mr. Ogden: The highway patrolman Williams, Chuck Williams would likewise testify that that was the custom and common practice there.

Mr. Smith: Your Honor, we would like to make known on the record that the patrolman Chuck Williams would not so testify.

The Court: Well, of course it doesn't make any difference. The Court will sustain the objection.

Mr. Ogden: You did object to that. I just wanted to be sure, if the Court please, that I made a record.

Would you like to have the instructions now, the au-
428] thorities that I have?

The Court: Yes, sir.

* * * * *

429] The Court: All right, proceed.

Mr. Ogden: If your Honor please, I want to get a stipulation at this time if I might, that the exhibit which is offered in evidence here, being drawing made by the county engineer, Mr. Bates, this copy was filed, sent to the Clerk of the U. S. District Court at Muskogee sometime shortly after May, 1956, for the purpose of permitting the inspection of it and checking of it by the plaintiffs at all times. I sent it here and it's here, and if they didn't inspect it, everybody had an opportunity to check it and question whether it was right or wrong, and let it be admitted.

Mr. Smith: What is it you want us to stipulate to?

Mr. Ogden: When we were here, you were not present -- Mr. Mountcastle was present -- and it was suggested that if we had a plat showing the conditions out there to use here at the trial, so that you people could look at it and check it and see if it was correct or not, and leave it with the Clerk.

We did that and there it is. I just --

The Court: Well, you have already introduced it. It has already been admitted.

Mr. Ogden: Well, if it's admitted, that's all that
430] is necessary.

Now, if your Honor pleases, I have some depositions. May I open here and read the deposition, a portion of which has heretofore been read by the plaintiffs in the case, being the cross examination? We wish to read the direct examination of the witness, the deposition of Dr. P. M. McNeill, taken at Oklahoma City, on the 6th day of September, 1956, on the part of the defendant; and if it's agreeable with opposing counsel, I will waive reading of the first part of it. You have already offered the cross examination heretofore.

Mr. Smith: Yes, sir, that's quite all right. We would like for him to read the answers and the questions.

Mr. Ogden: Sure, I'll be glad to do that. I meant the stipulation and notice and things of that kind.

(Reading)

"Direct Examination by Mr. Ogden:

"Q. Now, Doctor, would you tell the Court and jury your name and your profession?
"A. P. M. McNeill, physician.
"Q. And where do you practice, Doctor?
"A. Oklahoma City, Medical Arts Building; 1107 Medical Arts Building, Oklahoma City.
"Q. How long have you so practiced in Oklahoma?
431] "A. Since 1923. That is thirty-three years.

"Q. Doctor, is it agreeable in this case for you to waive the reading and signing of your deposition? Is that agreeable to you? The lawyers have agreed to it.

"A. Yes, sir.

"Q. Now, then, Dr. McNeill, of what school are you a graduate?

"A. The University of Oklahoma, School of Medicine.

"Q. And when did you so graduate? A. In 1923.

"Q. Now then, Doctor, since that time, would you tell the Court and jury what special training, if any, you have had in addition to graduating from the University of Oklahoma, School of Medicine?

"A. Well, I spent two years in a tuberculosis sanatorium, preparing particularly for chest diseases, and since then I have been affiliated with the University of Oklahoma in a teaching capacity, particularly as to chest diseases. I was head of the diagnosis department of the University of Oklahoma for ten years and I am still connected with that institution although I have a general practice downtown, a diagnostic practice.

"Q. Now, then, do you lecture in any institution on 432] chest diseases or chest injuries?

"A. Yes, sir; I lecture at the University of Oklahoma. I have assigned lectures each year and have for many years, on chest diseases.

"Q. And are you a member of the staff, that is, the faculty of the University of Oklahoma?

"A. Yes, sir; I am professor of medicine at the University of Oklahoma, School of Medicine.

"Q. And how long have you been professor of medicine at the Oklahoma School of Medicine?

"A. Since 1943, that would be thirteen years.

"Q. All right. Now, then, Doctor, do you have, or have you had, any connections with any other institutions, governmental institutions of any kind, in connection with your work? A. I am consultant in chest diseases at the Veterans Hospital in Oklahoma City and the Central State Insane Hospital at Norman and I am head of the medical department at St. Anthony's Hospital.

"Q. You are also head of the medical department of St. Anthony's Hospital in Oklahoma City? A. Yes, sir.

"Q. You say the Veterans Hospital in Oklahoma City, you are connected with that?

"A. Yes, sir; I am consultant on chest diseases.

433] "Q. Consultant on chest diseases? A. Yes, sir.

"Q. And then at the hospital at Norman, that is what is usually called the State Insane Asylum at Norman?

"A. Yes, sir; we have a ninety-bed tuberculosis sanatorium down there that I am responsible for, as well as all the chest conditions that arise. I have to see the patients.

"Q. And you are the head person, the head doctor, in charge of that? A. Yes, sir.

"Q. Is that right? A. Yes, sir.

"Q. Now, then, Doctor, in addition to that, would you tell the Court and jury whether or not you are duly and regularly licensed to practice as a physician in the State of Oklahoma? A. Yes, sir.

"Q. And you have been since shortly after you graduated from medical school? A. That is right.

"Q. Did you take any internship in any institution?

434] "A. Yes, I interned at St. Anthony's Hospital and then I spent two years in a tuberculosis sanatorium.

"Q. You didn't state where?

"A. In Oklahoma City.

"Q. And you have heretofore testified that you are the head of medicine up there at St. Anthony's now? A. Yes, sir.

"Q. St. Anthony's Hospital? A. Yes, sir.

"Q. Now Doctor, what associations or societies do you belong to? A. I belong to the Oklahoma County Medical Association, the Oklahoma State Medical Association, the American Medical Association, and I am a Fellow, we call it, of the College of Chest Physicians, which is a select group, about three thousand members in the United States; I am a Fellow of the American College of Physicians; a Fellow of the American College of Allergists; I belong to the Southern Medical Society. In fact, I belong to a lot of things, like most of the societies.

"Q. Doctor, would you tell the Court and jury whether

435] you spend any time each year in attending these different group meetings of associations and medical societies in carrying out and furthering your specialty of chest diseases and chest injuries? A. Yes, I attend the American College of Physicians which is held annually at various points in the United States, in medical centers, and I attend the American College of Chest Physicians, which likewise is held in various medical centers in the United States. I attend those each year and have for many, many

years.

"Q. And of course you attend local medical functions, like state and county? A. Yes, sir.

"Q. Then, Doctor, would you tell the Court and jury that you are a specialist, specialized in diseases and injuries to the chest? That is your specialty?

"A. Yes, sir.

"Q. And has been for a great number of years?

"A. That is right.

"Q. Would you tell us, Doctor, whether or not you had occasion to examine one of the plaintiffs in this case, this young man who brought a suit here in this court through his father and mother against Mrs. Franklin? Did you have
436] occasion to examine the young Shelton boy?

"A. Yes, I examined Robert Shelton on May 31st, 1956, at my office.

"Q. In Oklahoma City? A. In Oklahoma City.

"Q. Now, Doctor, would you tell us in your own way what you found and what his condition was in May when you examined him? Just in your own way explain the matter to the Court and jury. A. Well, this boy was brought to my office in the company of his mother, who stated that this child was in a car wreck July 3rd, 1955, at which time he sustained an injury to his chest and to his left ear and the back of his head. This accident occurred near Ardmore, Oklahoma, and he was taken from Ardmore to Baylor Hospital in Dallas, Texas, where rubber tubes were placed in his left chest. He was under an oxygen tent in the hospital and received two or three weeks treatment -- (interrupted)

"Q. Well, now, Doctor, are you telling now there what she told you?

"A. This is the history given by the boy's mother.
437] "Q. The mother told you that? A. That is right.

Following this three weeks in the hospital, some three weeks, he was under his local doctor's care in his home town of Sulphur Springs, Texas, for about six weeks following the injury. She states that he eats fairly well, seems to be nervous and irritable and crys at night. She states that his birth weight was 10 pounds and that he has gained normally until the accident occurred.

Now, when I examined the youngster, these were my findings: "Patient is a normally developed male, age three years, apparently in good health; no anemia, no jaundice, mentality

apparently normal. His height was 43 1/2 inches, his weight was 44 pounds." Now, the average weight for a three year old male -- the average for a three year old male is 36 1/2 inches in height, his height being 43 1/2, and the average weight is 31 pounds and his was 44 pounds which shows that his nutrition was good."

By Mr. Withington, that's the lawyer that appeared: "Which shows what?"

(Reading, continuing, by Mr. Ogden:)

"A. Which shows that his nutrition was good, because he is over in both height and weight. Therefore, he couldn't have lost much weight and have been in this good physical condition. His head was normal in contour and there is a three inch scar over the left occiput, that is the back of
438] his head, which was not adherent and was not tender and was in good condition. His eyes were negative; his ears, he has a scar over the posterior aspect over the left ear, that is, back of the left ear, about one inch long which is healed and with no deformity. Both ear drums were normal, showing that the ear hadn't been injured inside, his mouth was negative; teeth negative; throat negative, and by negative we mean normal. The chest was normal in contour, that means its configuration is normal. There is a small scar of a stab wound in the fourth interspace, that is between the ribs, on the left side of the anterioaxillary line which is a line halfway -- drops down below the shoulder or what you call the collarbone, and likewise in the ninth interspace in the posterioaxillary line.

"These are small scars where he had the tubes placed, the drainage tubes, when they were put in in Dallas following the accident. Both are in good condition and are not adherent, his lung expansion is free and equal, there are no areas of impaired resonance. That means there are no solid areas in the lungs, which means that there is no fluid, no inflammation and nothing that interferes with the air bearing lungs.

439] "His breath sounds were normal throughout both lungs, which means that at the time I examined him there was no

evidence of any residual disability to his lungs and no evidence of any active infection. His heart was normal in size, shape and position and there were no murmurs heard. His abdomen, his liver, spleen and kidneys could not be felt. There were no masses present.

"Mr. Withington: Could not what?

"A. Could not be felt. We call it palpable. I was just putting it in plain words. The extremities were normal and his reflexes were all normal. Fluoroscopic examination; the fluoroscopic examination of his chest showed the heart is normal in size, shape and position. Both diaphragms move well, which means there were no adhesions present and there was no evidence of any adhesions anywhere throughout his lungs. The x-rays showed that the sixth and seventh ribs had been fractured in the axillary line and have healed with a slight overlap. That is on the left side. The heart is normal in shape, size and position and the lungs are completely clear. His blood count was within normal limits.

I could give you the figures if you would like them.

440] "Q. (By Mr. Ogden) Well, you might give them to us.

"A. The red count was 4,650,000 and the white count was 10,050 and there was a normal type of the various cells, the polys, we call them were 44 and the lymphs were 50, 2 per cent eosinophil and 2 per cent monocytes. My diagnosis, after I examined him, was that he had an old healed fracture of the sixth and seventh left ribs in the axillary line and, second, he had a scar behind the left ear, and, third, a scar in the left occipital region. That was my diagnosis. Do you want me to give my opinion?

"Q. If you please, sir. Just tell us what your opinion, now, Doctor, was at the time you examined him as to the boy's condition. A. It was my opinion, after reviewing all the history, physical findings, x-ray, fluoroscopic examination, and laboratory findings, that this child received an injury to his left ear and his left occipital region, both of which were lacerated and have healed with a minimum amount of scarring. He must have had a good plastic job done at the time.

"He also received an injury to his left chest as evi-

441] denced by old healed fractures of the sixth and seventh ribs and from the history and subsequent

treatment, it is evidenced that he had received a traumatic pneumothorax or punctured pleura, which allowed air to escape into his pleural space. The air is absorbed from the pleural space and there is no evidence by fluoroscopic examination or by x-ray of any residual damage to the pleura or the underlying lung structures.

"The ribs are entirely healed at this time and will cause no further trouble. It is my opinion further that he has entirely recovered from the effects of the accident and there is no residual disability to the chest wall, pleura or lung.

"Q. In other words, Doctor, from your examination and your findings, you find and your opinion is that this boy is completely and entirely recovered, is that right?

"A. That is right. He has the scars, as mentioned, behind the left ear and back of his head.

"Q. Now, Doctor, he actually weighs more than the average or normal weight for a boy of that age, does he not?

"A. Yes, sir.

"Q. And he is actually taller than the average for a
442] boy of that age? You have given the dimensions here of the height and so forth, and he is actually taller, is he not, than the average for that age? A. Yes, sir.

"Q. And you find nothing wrong with him whatsoever, no damage to him at all, whatsoever; is that right?

"A. That is right. He has the scars from the accident.

"Q. But so far as any damage to his body, permanent disability or damages, he don't have any?

"A. That is right."

"Q. And you are a specialist is this field? A. That is right.

Now then, the cross examination was read by the opposing counsel the other day and offered in evidence.

Mr. Smith: Your Honor, unless the jury would want to hear it, we don't care to burden you again because we read it.

Mr. Ogden: I can't remember definitely, after you read the cross examination the other day, then I think I read the redirect examination; but I can't remember whether I did or didn't. If your Honor please, if I didn't read it, I don't know whether I did or not, I'd like to read it now,

but I just can't remember.

Do you remember, either one of you gentlemen, whether I read it?

443] The Court: You read some of it. I don't know whether you read all of it or not.

Mr. Ogden: Well, if your Honor please, maybe I had better read it.

Mr. Smith: We have no objection.

The Court: All right, Mr. Ogden.

Mr. Ogden: (Reading)

"Redirect Examination by Mr. Ogden:"

After cross examination:

"Q. Just like she claimed also that the boy had lost weight, didn't she? Didn't she claim that?
"A. Let me be sure. (Witness consults file)

"No, she didn't state definitely that he had lost weight. She said he hadn't gained since the accident.
"Q. And you found him to be overweight now from the normal? A. That is right.
"Q. And then about saying that he was nervous and couldn't sleep, or didn't sleep, or something like that, that is just what she told you? A. That is right.
"Q. Did you find anything medically or clinically to
444] support that, Doctor? A. No, sir.
"Q. Would you tell the Court and jury whether your findings negatived that or contradicted that finding or statement?
"A. Yes, sir; he wasn't a nervous youngster in my office.
"Q. He was not? A. No, sir.
"Q. And there wasn't anything to indicate that he was nervous or that he couldn't sleep or had any injury at all; is that right? A. That is right. The fact that he had gained this weight was against the fact that he was nervous because nervous children don't gain.

"Q. That is all, Doctor.
"A. They don't sleep and so they don't gain."

Then the recross, then the redirect:

"Q. But, Doctor, regardless of what he weighed at the time of the accident, when you examined him in May of this year, 1956, he was overweight for a boy of that age, was he not? A. That is right.
"Q. And he was overheight for a boy of that age?
445] "A. That is right.
"Q. And so he appeared to be in good health, did he not?
"A. That is right.
"Q. He was calm and deliberate and, you said, very cooperative; is that right? A. That is right.
"Q. And you couldn't find anything to indicate any permanent injury to him of any kind? A. That is right.

"That is all."

Now if your Honor please, we now offer in evidence this deposition which I have just read to the jury of Dr. P. M. McNeill.

The Court: That part of it.

Mr. Ogden: That's what I mean, that part that I just read to the jury.

The Court: All right, let it be admitted.

(Direct and redirect examination of Dr. P. M. McNeill in his deposition, as read, was received in evidence.)

Mr. Ogden: Now if your Honor please, I open here the depositions of Dr. Graybill and P. M. Fonville, taken at Ardmore, Oklahoma; and is it agreeable to waive the reading of these notices and --

446] Mr. Smith: (Interposing) Oh, certainly, go ahead and read it.

Mr. Ogden: Read the depositions. Thank you.

Franklin v. Shelton et al.

This deposition being taken at Ardmore, Oklahoma, on what -- the date -- it was taken on the 31st day of August, 1956, at Ardmore, Oklahoma, 2:00 p.m., and the appearances of the lawyers who appeared there was me, John B. Ogden, and Judge R. A. Howard, and Mr. J. E. Williams, one of the attorneys representing the plaintiffs in the case, who lived at Ardmore.

Direct examination of Dr. Ray B. Graybill, by John B. Ogden, counsel for the defendant:

(Reading)

"Q. Doctor, would you please state to the Court and jury your name, place of residence and profession?
"A. Ray B. Graybill, Doctor of Medicine, Ardmore, Oklahoma.
"Q. Dr. Graybill, of what school are you a graduate, or what preparation did you have?
"A. Temple University Medical School, Philadelphia, Pennsylvania.
"Q. And are you licensed to practice medicine in the State of Oklahoma? A. Yes, sir.
"Q. How long, Doctor, have you been so licensed?
447] "A. Six years.
"Q. And you practice where?
"A. In Ardmore, Oklahoma.
"Q. And you have practiced here how long, Doctor?
"A. Five years.
"Q. Dr. Graybill, would you tell us whether or not on or about July 3, 1955, you were called to see Mrs. Minnie Franklin, the defendant in this case, in your professional capacity? A. Yes, sir, on July 3 I was called to Ardmore Hospital to see Mrs. Franklin following an accident which she had just had.
"Q. When you arrived, she was in the hospital, is that right? A. Yes, sir.
"Q. Do you remember about what time of the day or night it was when you first saw her?
"A. Early afternoon.
"Q. Early afternoon on that date, July 3, when you examined her, tell us what you found, if anything, in the way of -- A. Yes, sir, the lady was in a state of mild shock; she had sustained injuries to the head and scalp,

448] and questionable injuries to the chest and shoulders.
I say questionable because we had not had an opportunity to do any x-ray study at that time. That was the condition I found her in at that time.

"Q. Would you describe what was visible, what you could see in the way of injuries to her head?

"A. She had multiple abrasions or contusions of the head and neck. She had two long lacerations measuring approximately 2 inches by 6 inches, a skin flap, and one inch by four inch skin flap on the top right central scalp, which were quite contaminated with dirt, debris, gravel, and then, as I mentioned, multiple abrasions around the head, neck and shoulders.

"Q. Doctor, the skin flaps you mentioned, for the benefit of the jury, tell us just what you mean by that.

"A. They were concentric cuts sustained in the accident, which if raised from the scalp were down penetrating to the skull bone, and if raised off the skull, they would measure approximately 2 x 6 inches -- I think 4 inches by 6, and 1 by 4, two of them.

"Q. One four by six.

"A. One four by six and about one by four.

"Q. Four by six. If you lifted it, you could get,
449] if you lifted the scalp up, you just lifted it up, is that right?

"A. Yes, it was completely detached from the skull.

"Q. Underneath that and in that you found gravel and debris, you said? A. Yes, sir.

"Q. Did you find any dirt? A. Yes, sir.

"Q. Would you tell the Court and jury, if you know, what you removed from those wounds in the way of substance?

"A. Just as you have stated, debris, dirt, gravel, I remember there was some dried grass.

"Q. All right. Could you have, if you lifted the scalp on top of her head that was loose, where it was four by six, you could have placed your hand underneath it?

"A. Yes, sir.

"Q. When you raised it, the skull bone was underneath right there, like she had been scalped? A. Yes.

"Q. Where did that start, using language which the jury would be able to understand, the language of a layman, tell us about where it started. A. The largest flap started over the left eye and protruded back over to
450] the center of the scalp, what is thought of as the

vertex of the scalp.

"Q. The other one, which was, you told us about how big it was. A. That was over the right eye.

"Q. You could have lifted that up and laid it back, the back of her head, her head was without scalp on it to that extent? A. Yes.

"Q. Was there any cut through the eye or any portion of the eyebrow? A. Yes, sir, this one flap had a wing, shall we say, the largest flap, penetrating over into the eyebrow and down into the upper eyelid.

"Q. So she had a wing, what do you mean by a wing, a cut going from -- A. An extension.

"Q. Down through the left eyebrow and into the left eyelid? A. Yes.

"Q. Would you tell us, then, in addition to that there were bruises, you said, on her body? A. Yes.

"Q. And on what parts of her body? A. The neck,
451] shoulders and chest, not to mention the extremities, arms and legs. She had multiple contusions throughout her body.

"Q. From your examination of her, what would be your opinion as to whether or not she at that time had suffered concussion of the brain? A. Yes, sir, I was of the opinion she had suffered mild concussion.

"Q. Of the brain? A. Yes.

"Q. Would you tell the Court and jury, please, what in your opinion a blow of that kind would do or did do to her with reference to shock of the nervous system?

"A. She was in a state of mild shock when I saw her, as I stated before, which persisted throughout her hospitalization period and manifested itself mainly by nervousness and by headache.

"Q. Nervousness and headache? A. Yes, sir.

"Q. Doctor, how long, if you recall, if your records show, was she confined to the hospital as a patient?

"A. Until July 12.

"Q. And when she left the hospital, do you know where
452] she went then? A. She went directly home.

"Q. What was done at home, if you know, for the purpose of taking care, looking after her?

"A. Rather extensive home care was outlined; it entailed a full time nurse, a hospital bed and all situations to simulate hospital-type treatment.

"Q. And she did receive that type of treatment, and

how long? A. I believe approximately a month.

"Q. After that did you think it was necessary that she receive treatment and car, and did she receive treatment?

"A. Yes.

"Q. It was reasonable and necessary, in your opinion?

"A. Yes.

"Q. Did you see her, then, as a patient in her home after she was removed from the hospital?

"A. Yes, sir, on two occasions.

"Q. On two occasions. After that did you see her any more? A. Yes, sir, I have seen her since that time on three or four occasions in my office.

"Q. Would you tell the Court and jury what she com-
453] plained of, if anything? A. The complaint she persistently had was continual headache.

"Q. Doctor, from your treatment of her and knowing the nature of the injuries she received, tell the Court and jury whether or not, in your opinion, the headache she had was the result of the injuries she sustained.

"A. I felt certain that it was.

"Q. You felt certain? A. Yes.

"Q. You have treated her, then, on up until what time?

"A. Well, she has still been my patient, I have seen her, the last time I saw her was August 7 of this year.

"Q. August 7 of this year? A. Yes.

"Q. Doctor, would you tell the Court and jury, in your opinion, whether or not this woman has suffered pain, injury, and/or discomfort on account of the injuries she sustained?

"A. Yes, sir, I feel so.

"Q. Doctor, would you tell us whether or not the scars which she had after this accident, whether or not they are and were disfiguring?

454] "A. They were and are a permanent disfigurement.

"Q. They are permanent, is that right?

"A. Yes, disfigurement.

"Q. Doctor, would you know whether or not, or is there any way to tell whether or not she will have in the future any difficulties or pain or discomfort of headaches, be more susceptible to those in the future than if she hadn't had this injury? A. There is no way to say that.

"Q. Time will have to tell, is that right, Doctor?

"A. Yes, sir.

"Q. She had been a patient of yours prior to this time?

"A. Yes, sir.

"Q. Doctor, you knew her condition before and after, is that right? A. Yes, sir.
"Q. I believe that is all."

Then the cross examination.

Mr. Mountcastle: With the Court's permission, I will as the questions.

The Court: All right, proceed.

(Mr. Mountcastle reads the questions and Mr. Smith
455] reads the answers as follows:)

"Q. Doctor, you treated Mrs. Franklin while she was in the hospital? A. Yes, sir.
"Q. And then you called at her home a couple of times after she was confined to her bed, while she was confined to her bed? A. Yes.
"Q. And you have seen her four times since then?
"A. Approximately four times.
"Q. Approximately four times, and those have been office calls? A. Yes, sir.
"Q. Seeing her in the office, and then the last time you saw her was a couple of weeks ago?
"A. Yes, sir, nothing referable to this case.
"Q. Nothing -- it had no reference to this case?
"A. No, sir, this last call.
"Q. These other six calls -- first I will say the four calls that she made at your office after she discharged her nurse at home, were they with reference to her troubles?
"A. Yes, sir, they were for re-x-ray study and --
"Q. You did make x-rays of Mrs. Franklin?
456] "A. Yes, sir. We failed to mention, too, that she had several fractured ribs, and that was the most extensive, most important thing for me to follow up with, required that we follow up with x-rays of these ribs.
"Q. Those ribs healed in the ordinary course?
"A. Yes, sir.
"Q. And at the time you last examined her, checking up on your x-rays, those ribs were back like they were before she had the fractures?
"A. I don't think I can answer that way, they weren't back the way they were before this accident, but they were

well healed.

"Q. They were well healed? A. Yes, sir.

"Q. Were they functioning as they did before the accident? A. Yes, sir.

"Q. Was she suffering any pain from them at that time?

"A. No pain referable to the ribs.

"Q. She hasn't suffered any pain since then, from the ribs since a short time after the accident?

"A. That's true.

"Q. Since the first healing period.

457] "A. That's true.

"Q. This pain that you talk about, how long did she suffer pain on account of this injury of July 3 of last year?

"A. Well, sir, she continued to complain of pain possibly a good three to four weeks after her dismissal from the hospital.

"Q. But that pain disappeared within the month she was confined to her home? A. Yes, sir.

"Q. So far as you know, she hasn't suffered pain since that time?

"A. With the exception of the headache we mentioned.

"Q. The headache, then, you attribute to this injury?

"A. Yes, I do, yes, sir.

"Q. To what part of the injury?

"A. To the head injury.

"Q. Well, now, does, are you, you are not willing to tell the Court and jury that that was caused, that it was the injury to the brain which caused the headache, are you?

"A. No, sir, I am not.

"Q. As a matter of fact, it is a fact that an in-

458] jury to the brain does not cause pain, isn't it, Doctor?

"A. That is so, yes, sir.

"Q. So the, now, these flaps you talked about, have they healed up? A. They have, yes.

"Q. And the scars they left are visible on Mrs. Franklin? A. Yes, sir.

"Q. And can be viewed by the jury? A. Yes, sir.

"Q. Now you say, except for the headache and the scars, she made an uneventful recovery from this accident and injury, did she? A. Yes, sir.

"Q. She is able -- there was no breaking of the bones of the extremities? A. No, sir.

"Q. The only bones you found broken were the ribs you have described? A. Yes, sir.

"Q. No interference with her ambulatory powers or anything of the sort? A. No, sir.

"Q. And you gave her good treatment, and you are
459] satisfied with the outcome, are you?

"A. Yes, sir.

"Q. I think that's a``."

Mr. Ogden: Then redirect examination by me:

(Reading)

"Q. Would you tell us, Doctor, how many ribs were broken, fractured? A. I knew I should have gotten those x-rays. I know that there were three ribs broken in the front and the back also, and one other rib broken only in the back.

"Q. So three ribs were broken in front and in the back also? A. Yes, sir. I cannot quote the ribs that were fractured at this time, I have it in my reports.

"Q. And one in the back? A. That's right.

"Q. So that would be three, six, seven different fractures? A. Yes, sir.

"Q. Of the ribs? A. Yes, sir.

"Q. You told Mr. Williams there about some rib deformity, how they got back together, he asked if they were as good as they were, and you gave an answer, what is your answer?

460] "A. I didn't state any rib deformity, he asked me if those ribs were back as they were before the injury.

"Q. And you said no? A. I don't feel any broken bone ever becomes just as it was before the injury, but there was no deforming effect as the result of the fractures to those ribs.

"Q. But they are not as they were before the injury?

"A. No, sir.

"Q. They are not. May I ask this one further question? After the injury, did she complain of -- since you knew her before, treated her before and treated her after that time, tell the Court and jury, in your opinion, whether or not she was more nervous or less nervous.

"A. I have treated Mrs. Franklin for approximately two or three years prior to the accident, and the answer to the question about the headaches being a result of the accident was stated by me, I thought it was a result of the

accident because she had never complained to me prior to the accident of headaches. Her nervousness was certainly accentuated after the accident, compared to prior to the accident."

461] Then the recross, and then another witness.

Mr. Smith: If the Court please, there is only one question and one answer, and if I may, I will read both at this time.

(Reading)

"Q. As a matter of fact, Doctor, it is very probable that the headaches from which she is suffering as purely psychic, isn't it? A. Very probable."

Mr. Ogden: Now next is the deposition of P. M. Fonville, taken at the same time and place, as a part of the depositions taken on that occasion at Ardmore on the date heretofore mentioned.

Questions by me:

"Direct Examination

"Q. Would you state your name to the Court and jury, please, sir? A. P. M. Fonville, Fonville Studios.
"Q. Ardmore, Oklahoma? A. Ardmore, Oklahoma.
"Q. Mr. Fonville, you are a photographer?
"A. Yes.
"Q. Here in Ardmore? A. Here in Ardmore.
462] "Q. And have been for how long, Mr. Fonville?
"A. Since 1919.
"Q. And your place of business is here in the city of Ardmore? A. Yes, on "B" Street.
"Q. Would you tell the Court and jury if at my request on or about the 28th day of August, 1956, you went out to a scene on Highway 77 south of Ardmore near where the sales barns are and the Chicken in the Rough restaurant?
"A. Yes.
"Q. And about what time of day or night did you go out there with me?

"A. It would be in the afternoon.

"Q. Did you take along anything with which you could take pictures? A. Yes.

"Q. And at my request did you take some pictures out there? A. Yes, sir.

"Q. And do you have them here in court today?

"A. Yes.

"Q. Do you recall where and from what point you took Exhibit No. 1? Would you look at Exhibit No. 1 and tell us whether or not you made that picture?

"A. Yes, I made it.

463] "Q. Is that a true photograph of what it purports to represent? A. Yes.

"Q. Mr. Fonville, before you made that picture or any other pictures to be hereinafter offered in evidence, tell the Court and jury what you did with reference to the height of your camera from which you did take these.

"A. I sat down in the car and had a man from that clinic, he came out, and we measured on his shirt about level with my eyesight standing on the ground.

"Q. A man came out from the clinic there, the veterinary hospital or something, and you and I and he were there, you sat down in a Pontiac automobile, '56 model, Star Chief, and you had me to stand by the side of the car so you could get your eye level, and you marked it with a pencil on my shirt so you would know where to put your camera. After you got out of the automobile did you place the camera at that position? A. Yes.

"Q. It would be your eye level? A. Yes.

464] "Q. Tell the Court and jury how tall you are.

"A. I am 5' 6".

"Q. You were sitting in a '56 Pontiac automobile?

"A. Yes.

"Q. This picture was made from your eye level sitting in the Pontiac? A. Yes.

"Q. What direction was your lens pointed at the time this picture was made? A. South, looking south down 77.

"Q. Looking south. Is No. 1, from what point was that picture made on the highway with reference to the Chicken in the Rough cafe?

"A. Well, looking south you are looking upgrade. It comes down in the flat and goes up another grade towards the Chicken in the Rough. I was right down in the bottom.

"Q. On a level with the pavement? A. Yes.

"Q. Down in the bottom of the hill, it would be south of the Chicken in the Rough where it goes down and starts up, pointed south? A. That's right.

"Q. That is a picture made from that point at your eye level from that position. Would you tell the Court whether or not the picture, Exhibit 1, is a true and
465] correct photograph of that road and scene from that point at that eye level.

"A. It was. It is.

"Q. I wanted to ask one other question. You say you have lived here since 1919. Have you had occasion to go out there different times?

"A. You mean that particular place? Well, just passing through, oh, yes, quite often.

"Q. Mr. Fonville, would you tell the Court and jury whether or not there has been any change of any kind in the highway and grades and the view since July 3, 1955.

"A. I don't think so.

"Q. You would know, wouldn't you?

"A. There hasn't been.

"Q. No change since that time? A. No.

"Q. We will offer Exhibit 1 in evidence."

Mr. Ogden: Now if the Court please, with permission of the Court, I would like to detach and remove these exhibits from this deposition.

Your Honor please, may I now hand to the jury the Exhibit No. 1?

The Court: Was it marked, is it marked?

466] Mr. Ogden: Yes, sir, on the back.

The Court: Go ahead.

Mr. Ogden: I didn't read the answer, I don't think, a minute ago to the last question. I had better read the question again:

(Reading)

"Q. We will offer Exhibit No. 1 in evidence. Mr. Fonville, I will hand you n what has been identified by

the reporter taking this deposition as Defendant's Exhibit No. 2, and ask you to tell the Court and jury what that is, if you know. A. Well, I just turned around in the same location and shot a picture looking north.

"Q. Looking north? A. Down the same highway.

"Q. From the same place as you did south, looking at No. 1 looking south, No. 2 is looking north from --

"A. From the same place.

"Q. And from the same eye level?

"A. Yes, the same.

"Q. Is that a true and correct photograph?

"A. A true and correct photograph.

"Q. Looking in that direction.

"By Mr. Ogden: We offer in evidence Exhibit No. 2."

467] Now then, if your Honor please, it is identified by the reporter on the back, and Exhibit No. 2 is in proper order; may I submit it to the jury?

Mr. Mountcastle: Yes.

The Court: Let it be admitted.

(Defendant's Exhibit No. 2 to deposition of Fonville, being photograph, was received in evidence.)

Mr. Ogden: Is it all right for me to go ahead while they are looking at that?

The Court: Yes.

Mr. Ogden: (Reading)

"Q. Now I will hand you what has been marked for identification as Defendant's Exhibit No. 3 and ask you to tell the Court and jury what this is, if you know.

"A. Well, this view, we moved north from where the second was made up on the rise, farther up looking north and a little east, showing the buildings on the east side of the highway.

"Q. Up on the rise? A. Up on the rise.

"Q. Is that a true photograph as shown there from the eye level and position from which you took it? A. It is.

468] "Q. Now, then, I will hand you what has been marked --

"By Mr. Ogden: We offer Exhibit No. 3 in evidence."

Now if your Honor please, I will offer Exhibit No. 3.

The Court: All right, let it be admitted.

(Defendant's Exhibit No. 3 to the deposition of Fonville, being a photograph, was received in evidence.)

Mr. Ogden: (Reading)

"Q. I will ask you, Mr. Fonville, I will ask you to look at Defendant's Exhibit No. 4 and tell the Court and jury what that is, if you know.

"A. This, we moved north up on the, kind of up on top of the crest of the hill. The view is made looking east and south, east and south, showing the --

"Q. Then your camera was on the west side of the road looking east and a little south? A. Yes.

"Q. Is that a true and correct photograph of what it purports to show? A. Yes.

"Q. Made at the eye level you have mentioned?

"A. Yes, the same eye level."

469] Now we offer in evidence Defendant's Exhibit No. 4. May I now --

The Court: (Interposing) Let it be admitted.

(Defendant's Exhibit No. 4 to the deposition of Fonville, being photograph, was received in evidence.)

Mr. Ogden: (Reading)

"Q. I hand you what has been identified by the court reporter as Defendant's Exhibit No. 5 and ask you to tell the Court and jury, if you know, what that is.

"A. This was made from the west side of the highway looking north and east, a little more east than north, down across the same --

"Q. The same highway, and the same place. Do you know whether or not it shows the sign there of the Chicken

in the Rough, the cafe?

"A. Well, yes, it is kind of small.

"Q. But you can sed it, is that right?

"A. Yes, you can see it.

"Q. Those buildings and those things shown in all the photographs are the same as they were a year ago?

"A. As far as I know.

"Q. Well, you would know?

"A. Yes, I am sure they are.

470] "By Mr. Ogden: We offer in evidence Exhibit No. 5."

If the Court please, we offer in evidence Defendant's Exhibit No. 5, I believe it's properly identified.

The Court: All right, let it be admitted.

(Defendant's Exhibit No. 5 to the deposition of Fonville, being photograph, was received in evidence.)

Mr. Ogden: (Reading)

"Q. I hand you Defendant's Exhibit No. 6 and ask you to tell the Court and jury, if you know, what that is.

"A. It is practically the same view, only we moved a little farther north from where I took --

"Q. Exhibit 5? A. 5, just a little north.

"Q. Is it a true and correct photograph of what it purports to represent? A. Yes.

"Q. And all these exhibits through No. 6 are true and correct photographs of what they purport to be?

"A. Yes.

"Q. Taken from about the eye level that you testified?

"A. Yes, all made --

471] "By Mr. Ogden: We offer Exhibit No. 6 in evidence."

The Court: Let Exhibit No. 6, Defendant, be admitted.

(Defendant's Exhibit No. 6 to deposition of Fonville, being photograph, was received in evidence.)

Mr. Ogden: (Reading)

"Q. I hand you what has been identified as Defendant's No. 7. I wish you would tell the Court and jury, if you know, what that is. A. Yes. Now, this was made right west, almost practically in front of the Chicken in the Rough, and the camera is looking south and a little east, just a little south and a little east at the same eye level.

"Q. Is that a true picture of what it purports to show and the road and the street and all that, the buildings?

"A. Yes.

"By Mr. Ogden: Then we offer Defendant's Exhibit No. 7 in evidence."

Which I now hand to the jury, with the Court's permission.

The Court: All right. That's Exhibit No. 7; let it be admitted.

(Defendant's Exhibit No. 7 to deposition of Fonville, being photograph, was received in evidence.)

472] Mr. Ogden: (Reading)

"Q. May I ask, Mr. Fonville, if you will look at Defendant's Exhibit No. 8 and tell the Court and jury, if you know, what that is there? A. This was made right west of the highway in front of the Chicken in the Rough, looking east, showing the Chicken in the Rough.

"Q. In other words, you went across the highway, so that if a person standing or sitting opposite the Chicken in the Rough cafe and was on the west side of the highway looking across the highway at the Chicken in the Rough, is that right, on the west? A. Yes, I am on the west.

"Q. Looking straight across the highway at the Chicken in the Rough? A. Yes.

"Q. Is that a true and correct photograph of what it purports to represent? A. Yes, it is.

"Q. I will ask you if in addition to these pictures, if you looked at then and before, at the highway there, whether or not there are bar ditches on either side, or is it practically level with the highway there on either side? Would you describe that picture, does it show the ground there? A. In this picture, it shows the highway.

"Q. Yes, sir, and the ground by the highway and the --

473] "A. Yes. It is level, gravel.
"Q. Yes. And that is a true and correct picture?
"A. Yes, that is true.

"By Mr. Ogden: We now offer that in evidence."

The Court: Let No. 9 be admitted.

Mr. Ogden: I thought it was 8.

The Court: Well, No. 8.

Mr. Ogden: All right, we offer that in evidence.

The Court: All right, let No. 8 be admitted.

(Defendant's Exhibit No. 8 to deposition of Fonville, being photograph, was received in evidence.)

Mr. Ogden: (Reading)

"Q. I ask you to look at Exhibit No. 9, if you will, and tell the Court and jury what that is, if you know.
"A. This is looking west from the front door of the Chicken in the Rough, looking west across the highway right straight.
"Q. In other words, that, No. 8 was made from the west side looking east? A. Yes.
"Q. This is made on the east side looking west at the
474] same height? A. The same height.

"By Mr. Ogden: Then we offer Exhibits 8 and 9 in evidence."

I have already handed them 8. I offer No. 9.

Mr. Mountcastle: No objection.

The Court: All right, let it be admitted.

(Defendant's Exhibit No. 9 to the deposition of Fonville, being photograph, was received in evidence.)

Mr. Ogden: (Reading)

"Q. And we now ask, would you look at Exhibit No. 10, please, Mr. Fonville, and tell us what that is, if you know.

"A. Yes, we were just past the Chicken in the Rough and looking north and east toward Ardmore down Highway 77.

"Q. Would that be what you would see if you were standing there just to the north of the Chicken in the Rough and on the east side of the highway or street and looking to the north and a little to the east? A. Yes, I am standing on the west side of the highway looking to the north and east.

"Q. Tell us whether or not the houses that are shown
475] in the distance, whether or not they are in Ardmore.

"A. Yes, they are in Ardmore, you can see the standpipe over here.

"Q. That is a true and correct photograph of what it purports to show from that source, they were made from your camera and you developed these, you know they are true and correct? A. Yes."

We now offer Exhibit No. 10 in evidence.

The Court: Let it be admitted.

(Defendant's Exhibit No. 10 to the deposition of Fonville, being photograph, was received in evidence.)

Mr. Ogden: Now then the cross examination by Mr. Williams.

Mr. Smith: If the Court please, next in the deposition we have the cross examination of the photographer, dealing with these photographs that have been offered out there.

Plaintiff here is willing to waive this cross examination rather than read it all to the jury.

The Court: All right.

Mr. Ogden: All right, sir.

Mr. Smith: The rest of the deposition, save and ex-
476] cept about a page, deals with our questioning Mr.

Fonville, the photographer who made these pictures.

Now if we may have an understanding these pictures were made definitely on the date he testified to here, we are willing for them to go to the jury without at all burdening them with the reading of the deposition.

The Court: All right, you will stipulate to that, won't you, Mr. Ogden? You will stipulate that these photographs may be admitted without reading the deposition?

Mr. Ogden: Sure, yes, sir.

The Court: All right, let them be admitted. What exhibits are they?

Mr. Smith: These are Exhibits 5 and 6 heretofore identified.

The Court: All right, let them be admitted.

(Photographs, Exhibits 5 and 6, are received in evidence.)

Mr. Ogden: If your Honor please, we desire a portion of the direct examination, it says, by Mr. J. E. Williams, the counsel for plaintiff, on page 33 of the deposition.

The Court: All right.

Mr. Ogden: (Reading)

"By J. E. Williams, of Counsel for Plaintiffs:

"Q. Did you observe the signs between the city limits
477] of Ardmore going south to the Chicken in the Rough?
"A. Well --
"Q. I am asking you to direct your attention to a sign that gives the speed limit between the city limits of Ardmore and the Chicken in the Rough.
"A. Well, there is one, I remember, 35 miles, I believe."

The Court: All right.

Mr. Smith: Your Honor please, in view of that, we want to offer the next few questions and answers.

The Court: All right.

Mr. Ogden: We have no objection.

Mr. Smith: The very next question:

(Reading)

"Q. That is the one going north, isn't it?
"A. Yes.
"Q. Did you notice one going south?
"A. Well, I don't recall.
"Q. You don't recall that there is one going south?
"A. No."

The Court: All right.

Mr. Ogden: That's all.

We then offer, if your Honor please, the deposition,
478] the portion thereof read, together with the pictures, in evidence.

The Court: All right, let them be admitted.

(Portions of the Fonville deposition as read, and the exhibits offered, were received in evidence.)

Mr. Smith: Your Honor please, we offer the language we read here as our next exhibit.

The Court: All right, let it be admitted.

(Portions of the Fonville deposition as read by Mr. Smith, were received in evidence.)

EVALYN WILLIAMS, called as a witness on behalf of the defendant, testified as follows:

Direct Examination by Mr. Ogden:

Q. Young lady, would you tell the Court and jury your name, please, ma'am? A. Evalyn Williams.
Q. Where do you live, Mrs. Williams?
A. Ardmore.
Q. You are a widow? A. Yes, sir.
Q. And what is your business, trade or profession?
A. Alvin's Chicken in the Rough.
479] Q. Is that the place that's shown in these pictures, the pictures in evidence here show what that place -- that's the place that's called Chicken in the Rough close to where this accident happened? A. Yes, sir.
Q. Do you own and operate that? A. Yes, sir.
Q. How long have you owned and operated that?
A. For two and a half years.
Q. About how big a place is that?
A. I can seat 82 people.
Q. About how many people work for your employment, by you there running that?

The Court: It doesn't make any difference.

Mr. Ogden: Couldn't I show the other people, if your Honor please? I thought it might --

The Court: (Interposing) Well, no, it doesn't make any difference.

Mr. Ogden: All right.

A. (The Witness) Sixteen.

The Court: Well, the Court said -- you didn't understand. All right, go ahead.

By Mr. Ogden:

Q. Now then, have you operated that for some time, owned and operated? A. Yes, sir.
Q. About how long? A. About two and a half years.

480] Q. Were you so operating and owning that on July the 3rd, been a year ago last July the 3rd?
A. Yes, sir.
Q. Where were you on that particular day?
A. I was there at the restaurant.
Q. Do you work there yourself, I mean actually go into the work yourself, I mean there, in charge of it, or just -- A. (Interposing) Yes, sir.
Q. And about -- you were there on that occasion, is that right? A. Yes, sir.
Q. Now the front of that, the front part of that cafe, that faces the highway, does it, the front part faces the highway -- the pictures are in evidence and this is kind of leading -- the front part faces the highway, doesn't it? A. Yes, sir.
Q. Then is there anything out in front of the cafe itself between the cafe and the highway? A. My sign.
Q. Your sign. And could you tell us just about how high the sign is up, a point or something or anything off the ground?
A. Well, I would judge about 12 or 14 feet high.
481] Q. Now then, around the base of the sign -- well, I will ask you, first, about how big is the sign, do you know the length or width or anything?
A. I would say the iron bars to protect my sign is about six or eight, six or seven feet long.
Q. They go around the base of it to keep people from running into the bars? A. Yes, sir.
Q. Now would you tell the Court and jury on that occasion, if you remember, or if you know, whether or not there was any grass growing any place on July 3rd, 1955 around --
A. Just inside of that island that's around my sign.
Q. Around your sign? A. Yes, sir, just inside.
Q. Was there grass anywhere else growing in that vicinity between there and the street anywhere, either up or down the highway, as far as the distance, say, of a hundred feet? A. Not around my place, no, sir.
Q. Well, on that side of the highway?
A. No, sir.
Q. Was there any grass -- that's the only place. Now then, would you tell us then on that occasion if there was a Mrs. Baze employed by you. A. Yes, sir.
Q. And in what capacity?

482] A. One of my waitresses.

Q. Now on this date -- I asked you a moment ago and forgot to finish, I think -- the front of your cafe, will you tell us whether or not it is just solid wood, whether it's glass across the front door or what?

A. Well, it's, I have picture windows in most of the front. It's glass.

Q. All right, do you have any coverage over that glass or can you see out of it? A. I have drapes.

Q. You have drapes? A. Drapes.

Q. And the cafe facing to the west, were those drapes pulled or that day or open?

A. They were pulled due to the sun.

Q. Due to the sun. So you couldn't stand in there and look out and see? A. No, sir.

Q. Now on that date would you tell the Court and jury whether or not anything unusual happened or whether you heard anything?

A. Well, I head a loud noise and I said --

Mr. Smith: (Interposing) Object to that.

The Court: No.

483] By Mr. Ogden:

Q. Just don't tell what you said. That wouldn't be proper. Just tell -- did you hear anything?

A. A loud noise.

Q. Now don't tell what you said, but would you tell the Court and jury, please, ma'am, when you heard this loud noise what did you then do?

A. I ran to the front door and ran outside and I saw a car right there by my sign on the south side and the door was open and I ran out there and there I found the lady on the ground with her head on the ground, and I raised this lady up, and when I did -- she lacked about this far being from her car, and I leaned her shoulder against her car, and it looked like her eye was falling out, and there was blood running down her face, and her face was covered in dirt and I ran into the house back into the cafe and asked if we had any clean towels and to wet them with cold water.

Q. Now it wouldn't be proper, Mrs. Williams, for you to tell what you said or did to anybody you say, or what you

said to some other people. A. I'm sorry.

Q. Now then, so did Mrs. Franklin appear at that time, you said her eye was --

Mr. Smith: (Interposing) Object to it as leading.

Mr. Ogden: It is leading, but I thought probably per-
484] taining to the eye wasn't much controversy about it.

By Mr. Ogden:

Q. Now then, as I take it, you went back in and did you --

Mr. Smith: I believe that's leading.

The Court: Ask the question what she did.

By Mr. Ogden:

Q. I was just directing her attention -- did you request anyone to call the highway patrol? A. Yes, sir.

Mr. Smith: I believe that is leading, your Honor.

Mr. Ogden: Yes, sir. Then we will have to take a little more time, then.

By Mr. Ogden:

Q. Tell us what you did inside the cafe.

A. I said --

Mr. Smith: (Interposing) We object to what she said, your Honor.

The Court: Yes, sustained.

Mr. Ogden: All right, your Honor.

Q. I will ask you whether or not you directed somebody to call the ambulance.

A. Yes, sir, I did, and the highway patrol.

The Court: And what?

The Witness: And the highway patrol.

The Court: That's all right.

485] By Mr. Ogden:

Q. Now then, would you state if you know whether anyone from the cafe went out to the scene after that immediately? A. Mary Baze.

Q. Mary Baze. Did you go back immediately?

A. No, sir, I blacked out.

Q. So then the next time you went there was later?

A. Uh huh.

Q. I hand you a picture here called Exhibit No. 9. Would you tell the Court and jury if that is a picture of the sign about which you have testified? A. Yes, sir.

Q. Now then, picture No. 8, is that a picture of your cafe also showing the sign as it was on that occasion?

A. Yes, sir.

Q. Looking at it from across the highway. Now could you tell us where Mrs. Franklin's car was with reference to that sign? You told us where she was. Did you notice where her car was, Cadillac car?

A. The car was on the south side of my sign and the wheel was about even with this signpost, and it lacked about this far because the door was open, and she looked like she was out, just out on the ground, but when I raised her up, her arm, I just pulled her a little bit and her shoulder against the door.

486] Mr. Ogden: Now if your Honor please, I think it is in evidence as to how far that sign is from the pavement.

By Mr. Ogden:

Q. Do you know how far --

The Court: Yes, you asked her -- I don't know whether you asked her how far it was, but I think it's admitted in evidence.

Mr. Ogden: Now if your Honor please, for the benefit of the record, we would like to tender the same proof here that we suggested to the Court on the other witnesses.

The Court: No.

Mr. Ogden: May we tender this for the record so that it will show?

The Court: All right. Plaintiffs object and the objection is sustained.

Cross Examination by Mr. Smith:

Q. You live in Ardmore, Mrs. Williams?
A. Yes, sir.
Q. And you didn't see the wreck happen, of course?
A. No, sir.
Q. All right. You were inside of your restaurant?
A. Yes, sir.
Q. You and Mary Baze were on the inside of the restaurant? A. Yes, sir.
Q. And the blinds were pulled, is that layman's
487] language -- does that mean the windows had blinds pulled over them and the drapes were where you couldn't see out? A. Uh huh.
Q. All right, and sometime after the accident happened, you and Mary ran out together? A. No, sir.
Q. All right. Did I understand you to say that you and Mary were in the restaurant at the time the accident happened? A. Yes, sir.
Q. You don't know when Mary went out?
A. Yes, sir, I do.
Q. Did she go following you, or --
A. No, sir, I came back in and asked her to take --
Q. (Interposing) You can't -- I'm not asking what you asked her. A. Mary went out.
Q. Went out after you did?
A. After I came back in, yes, sir.

Mr. Smith: That's all.

(Witness withdraws)

488] MARY BAZE, called as a witness on behalf of the defendant, testified as follows:

Direct Examination by Mr. Ogden:

Q. State your name, please.
A. Mary Baze, B-a-z-e.
Q. Mrs. Baze, you live in Ardmore? A. Uh huh.
Q. Mrs. Baze, on July the 3rd a year ago, last July the 3rd, 1955, will you tell the Court and jury where you were employed, if any place? A. Chicken in the Rough.
Q. Is that the place or near the place where the accident complained of herein happened? A. Yes.
Q. And what were you doing at the Chicken in the Rough? A. I was working.
Q. About how long, Mrs. Baze, had you been employed there at that time?
A. Well, at that time it was seven or eight weeks.
Q. And in what capacity were you employed?
A. As a waitress.
Q. Now would you tell the Court and jury on July the 3rd, 1955, if while you were there in the cafe -- first, could you see out of the cafe, just look out to the
489] road? A. Well, with the shades down I couldn't. I could have pulled the shades.
Q. Well, I just asked you: Do you know whether you did, whether the shades were pulled or not, draped?
A. Yes, they were.
Q. And you can't see out. Now would you tell the Court and jury on that date whether or not anything unusual happened or whether you heard any unusual noise?
A. Well, nothing except just a loud bump.
Q. Loud noise. All right. Now then, did you then, what were you doing at that time, if you remember?
A. Well, at that time I was taking dishes to the back.
Q. At that time, then, did you then shortly thereafter go out to the scene? A. Yes.
Q. Out to the front. Now at whose request, if anyone's, did you go out there; were you advised to go out?
A. Mrs. Williams'.
Q. Mrs. Williams, the lady that owned the place?
A. (Nods affirmatively)
Q. What did you take with you, if anything, when you

went out?

A. Well, I got some towels and a pan of water.

490] Q. When -- did you then immediately go out when you got those and did you go at her request?

A. (Nods affirmatively)

Q. Now when you went out there to the scene, would you tell us what you observed with Mrs. Franklin's car, with reference to Mrs. Franklin's car, if you remember?

A. Well, when I got out there, of course I noticed there had been a wreck, and I went around to both cars to see, you know, the position everyone was in, and well, I guess that --

Q. Would you tell the Court and jury whether or not you attempted to help the people the best you could?

A. Yes.

Q. And you were there then when actually they were removed, is that correct? A. Yes.

Q. Do you remember about where Mrs. Franklin's car was with reference to the sign in front? Now I haven't asked you if there was a sign in front, but I will ask you now: Was there a sign there in front? A. Yes.

Mr. Ogden: I'll get a picture of it here just as a matter of --

The Court: I think they will stipulate it.

Mr. Smith: We will.

491] By Mr. Ogden:

Q. I was just going to ask with reference to the sign shown in both these exhibits, 8 and 9, too, pictures of that sign; that's correct, isn't it?

Now would you be able to tell us about where Mrs. Franklin's car was, if you know, with reference to that sign?

A. Yes.

Q. Tell us just about where it was.

A. Well, it was on the south side of the sign.

Q. South side of the sign? A. Yes, sir.

Q. Now about how near to it, if you know?

A. Not too good, possibly that far south, I would think. (Indicating)

Mr. Ogden: Now if you will hold your hands here and we will stipulate -- would you put them there again, just about?

The Witness: About like that.

Mr. Ogden: Is that about 16 -- 18 inches? All right.

The Court: You will stipulate to that?

By Mr. Ogden:

Q. Do you know how many inches or feet -- can you tell the jury? A. No.

492] Mr. Mountcastle: I'll stipulate anything you think it is.

Mr. Ogden: Between 16 and 18 inches.

Mr. Mountcastle: That's all right.

Mr. Ogden: I don't know if I'm right.

By Mr. Ogden:

Q. You saw the other car there; do you remember the position about where it was? A. Well, it was close by.

Q. Close by? A. Yes.

Q. Now then, I'll ask you if you tried to make any particular notes or reference so you would know about the details of the whole situation there? A. No.

Q. You didn't talk to anybody about it until when, after that?

A. Well, it was the last part of August.

Q. This August, this immediate past August?

A. Yes, sir.

Q. Just ten or twelve days ago? A. Uh huh.

Q. You talked to me about it last Thursday, and that's the only time you talked to anybody? A. Uh huh.

Q. You didn't anticipate being a witness in that,
493] but just told about what you know about it?

A. That's all.

Mr. Ogden: One more question.

By Mr. Ogden:

Q. Would you tell the Court and jury whether or not there was any grass around the sign? A. Yes.
Q. Was there any grass growing anywhere else in that vicinity? A. No.

Mr. Ogden: I believe that's all.

Cross Examination by Mr. Smith:

Q. Now Mrs. Baze, you didn't see the accident, did you?
A. No.
Q. All right. Now you thought no more about the accident until August of this year, did you, following it?
A. No, well, it did stay with me two or three months.
Q. Now you made no statement or told nobody about it, I believe you said to Mr. Ogden, until August of this year?
A. Uh huh.
Q. Now you would not be in as good a position to testify as to where the automobiles came to rest, since you didn't see the accident, as the witnesses who saw the accident, would you, Mrs. Baze?

494] Mr. Ogden: Your Honor please, object to that.

The Court: Sustain the objection.

By Mr. Smith:

Q. Are you still working at Chicken in the Rough?
A. No, I'm not.

Mr. Smith: That's all.

Mr. Ogden: That's all.

(Witness withdraws)

(The following out of the hearing of the jury)

Mr. Ogden: Your Honor please, I know what the Court's ruling is, I believe, but I want to make my record on it. I tried in my answer to plead, as your Honor knows, that these people lived in Texas, owned the car jointly, on account of the laws of Texas they acquired it legally jointly, and so on, and ask the Court to instruct that, but I want to, if I might, tender a supplement to the answer and cross complaint for the reason that I probably -- I don't actually think it's a fact -- but I think it might be that I didn't plead that as fully as I should to protect my record.

On the 31st of August I sent Mr. Mountcastle a copy
495] and told him I wanted to present it. So they would be advised; that was August 31st, in my letter.

I would like to offer that in evidence if I might as supporting my application, and I just want to make the record complete on it.

The Court: All right.

Mr. Smith: Of course we are not going to agree to it because I don't think it's the law.

The Court: Well, you offer it and you object to it.

Mr. Smith: We object to it.

The Court: Objection be sustained.

Mr. Ogden: I offer the letter, if your Honor please, so it's not a question of surprise.

The Court: All right, what will the number be?

The Clerk: No. 8.

The Court: Defendant's Exhibit No. 8, to which plaintiffs object and the objection will be sustained.

Mr. Ogden: Just for the record, you people did receive a copy of this letter?

Mr. Smith: I am sure that if you sent us a copy, we did.

Mr. Mountcastle: We received a copy.

(The following again in the hearing of the jury)

Mr. Ogden: Would you mark these defendant's exhibits?

496] (Defendant's Exhibits 10, 11 and 12, being photographs, were marked for identification.)

Mr. Ogden: If your Honor please, we have Exhibits 10, 11 and 12, which we would like to offer in evidence. I understood there would be no objection on their part, but there seems to be.

Mr. Smith: May we be heard, your Honor? These pictures never have been shown to counsel for plaintiffs until this minute. We have never seen any of them, we don't know when they were made or anything about them, and for that reason we object to them.

The Court: Well, you don't have the photographer here to identify them?

Mr. Ogden: Well, if your Honor please, we can have the photographer come over here from Ardmore and just say --

The Court: Well, we are not going to wait for the photographer to come from Ardmore.

Mr. Ogden: May I just say this, your Honor, these pictures -- may I make a statement out of the presence of the jury? I'll do it later.

The Court: All right, call your next witness.

Mr. Ogden: I will do it later, and your Honor overrule them at this time.

The Court: All right.

497] R. A. HOWARD, called as a witness on behalf of the defendant, testified as follows:

Direct Examination by Mr. Ogden:

Q. Judge Howard, where do you live?
A. Ardmore, Oklahoma.
Q. And about how long have you lived in Ardmore?
A. 55 years.
Q. Have you held any official positions in this state?

Mr. Smith: We object to this line of testimony, your Honor. We believe it's immaterial in this case, to any issue.

The Court: Yes, that's right. We will sustain the objection.

Mr. Ogden: As to whether or not he has held any position?

The Court: It doesn't make any difference about what he is going to testify about some local situation down there.

Mr. Ogden: Well, if your Honor please, he is going to testify --

498] The Court: (Interposing) Well, go ahead, I'll admit it then if there is going to be an argument about it. What positions have you held?

Mr. Ogden: I don't think it makes any difference.

By Mr. Ogden:

Q. You have lived there, I believe, this -- you said how many years? A. 55 years.
Q. How long have you practiced law in Oklahoma?
A. Well, I came here in 1899, that was Indian Territory days then.
Q. Now then, have you heretofore and do you now represent as an attorney, Mrs. Franklin, the defendant in this case? A. Yes.

Q. And would you tell the Court and jury whether or not you were here in the court room yesterday when Mr. Crawley, the driver of the bus, testified? A. I was.

Q. And I will ask you if you heard him testify substantially that you went with him out to the place involved here on the Chicken in the Rough, and showed you certain measurements and something of that kind?

A. Yes, I heard that.

Q. Now I will ask you to tell the Court and jury whether or not you ever went to that place with him or took him out there? A. I never did.

499] Q. Would you tell the Court and jury whether you talked to him? A. I talked to him once.

Q. Where? A. At the bus station.

Q. And who was with you when you talked to him?

A. Mrs. Franklin and her little grandson, and Mrs. Howard.

Q. And will you tell the Court and jury what he said, if anything, if he made a statement he expected something to happen like that or what --

Mr. Smith: If the Court please, we object to that.

The Court: Yes, you didn't ask him that question.

Mr. Ogden: Your Honor please, I thought I specifically did.

(There is a conference at the bench, out of the hearing of the jury and the reporter.)

(The following again in the hearing of the jury)

By Mr. Ogden:

Q. Mr. Howard, the Court said you may answer the question.

A. I talked to him and tried to find out from him --

Mr. Smith: If the Court please, we want to object to any statement.

The Court: Yes. The only question you can ask him is the question you asked.

500] By Mr. Ogden:

Q. Did he state at that time to you that he had been driving behind the Shelton vehicle and he had expected something like that to happen or words to that effect?
A. Yes.

Mr. Smith: Object to that as leading. Well, that's all right.

The Court: All right.

Cross Examination by Mr. Smith:

Q. Mr. Howard, you testified that you are representing Mrs. Franklin here today, aren't you? A. Yes.

Mr. Smith: That's all.

(Witness withdraws)

MINNIE FRANKLIN, the defendant, called as a witness in her own behalf, testified as follows:

Direct Examination by Mr. Ogden:

Q. Mrs. Franklin, will you talk, please talk just as loud as you can and talk to the farthest juror so they can all be sure and hear you. A. Do my best to.
Q. Mrs. Franklin, would you tell the Court and jury
501] your name, age and post office address?
A. My name is Mrs. Minnie Franklin and I am 66 years old and I live at -- you mean my address?
Q. Well, just wherever you live.
A. I live at Ardmore.
Q. In Ardmore? A. Yes.
Q. Mrs. Franklin, how long have you lived in what is now Carter County? A. Carter County?
Q. Yes. A. All my life.
Q. You was born there, is that right?
A. Yes, out close to Ardmore, Wilson.
Q. You lived there all your life, and you are a widow; the plaintiff alleges that, and your husband is dead.

Now then, with whom, who lives with you, if anyone?
A. Well --

Mr. Smith: (Interposing) If the Court please, I don't want to interrupt, but the question was "Who lives with you, if anyone?" I believe that's immaterial to this.

The Court: Yes, sustained.

Mr. Ogden: If your Honor please, may I make an offer
502] of proof on that? I think it's pertinent, if your Honor pleases.

The Court: All right.

(The following out of the hearing of the jury)

Mr. Ogden: If the witness was permitted to testify, she would testify that she lives with her, an invalid daughter and a grandson, and that she herself looked after them and did the work and cared for them before this accident, that was work that she was engaged in, looking after and caring for them; that since the accident she has not been able to do all that. They still are with her, live with her, and she has to employ people to do it for her, which we think is very important.

Mr. Smith: Doesn't pertain to any issue in this case.

The Court: All right, I will sustain the objection.

Mr. Ogden: All we want to get at here is the truth about what actually has happened, the conditions; she has to hire somebody to do it now. She has that obligation and can't get rid of it, so I just really feel that I ought to be permitted to show.

The Court: Of course I'll let him show the work she did before and after, but not let in testimony in regard to relationship and things of that kind.

503] Mr. Smith: That's what I meant, your Honor.

(The following again in the hearing of the jury)

By Mr. Ogden:

Q. Do you remember the question I asked you?
A. Yes, sir, how long I'd lived in Ardmore.
Q. You told us that. Then I asked you if you as to who resided with you and what your duties were before the accident.
A. Well, I was keeping house, doing my housework, and I have a widowed daughter who is very sick --

Mr. Smith: We believe that's the thing.

The Court: Ladies and gentlemen of the jury, the Court is admitting this testimony not for the purpose of showing this condition of her daughter or grandson or whoever it may be, but to show the work that she did. She claims she did certain work prior to the accident and she can't do that work at this time.

I am admitting it on that theory, that she says she did the work before and she says she can't do it subsequent to that time.

Is that right, Mrs. Franklin?

The Witness: I done all my housework before the accident; is that what you mean?

The Court: Yes.

The Witness: Uh huh.

504] By Mr. Ogden:

Q. Now you did all this work for this invalid daughter and grandchild? A. Yes, sir, I did.
Q. Now Mrs. Franklin, they lived with you then and do now? A. Yes.
Q. Is that right. Now Mrs. Franklin, I want to ask you, if I may: You had a grandchild there, someone with you in the car on the date of the accident, is that right?
A. My little grandson, little boy that I have raised with my daughter there.

Mr. Smith: I don't want to burden the jury with objections, but we believe that counsel should refrain from asking leading questions of this witness.

The Court: Well, all right.

Mr. Ogden: I didn't mean to ask a leading question, Judge.

The Court: Go ahead.

By Mr. Ogden:

Q. Now then, how old is that child that was with you that day?

A. He was 4 years old then; he's 5 now.

Q. He's 5 now. Now then, Mrs. Franklin, at that time did you own an automobile? A. Yes.

Q. And what kind of a car was it?

505] A. It was a '53, secondhand Cadillac.

Q. You bought it secondhand? A. Yes.

Q. And it was a '53 secondhand Cadillac, and you bought it, and this happened in 1955? A. Yes.

Q. Now then, on that particular day, would you tell the Court, if you know, and jury, what day of the week that was on? A. You mean this accident?

Q. Yes. A. It was on the 3rd of July, I believe it was on Sunday.

Q. Mrs. Franklin, now would you tell the Court, before this accident, just describe to the Court and jury generally what was your state of health; were you able to work, look after your household duties and things of that kind? A. You mean up to the time?

Q. Before the accident, yes. A. Well, I was doing my general housework, you know, and taking care of the little boy, because my daughter wasn't able to do anything.

Q. Did you have anybody to come in to work some in addition to that? A. Well, we'd have someone, like most everybody does, to help clean my house and when I'd get sort of where I just couldn't do it all.

506] Q. Now then, living in the house with you were these --

The Court: Don't go into tha. She has said that two or three times.

Mr. Ogden: I was just kind of getting started off on another foot. I withdraw that question, Judge.

The Court: No, let's go ahead.

Mr. Ogden: I think you are right about it.

By Mr. Ogden:

Q. Then on this particular occasion, on the 3rd of July, would you tell the Court and jury, though, prior to that time if you had ever been down south of Ardmore on Highway 77 to what is commonly called the Chicken in the Rough, tha' place? A. Before that time?

Q. Yes. A. Oh, yes.

Q. You lived there in the county all your life?

A. Yes.

Q. And about where did you live with reference to Highway 77, Mrs. Franklin? A. Where my home is now?

Q. Yes, where it was then and is now.

A. Well, I still live in the same place, live 1101 507] North -- (street name inaudible)

Q. So the jury will know where that is with reference to Highway 77, is that north or south? A. It's southwest of town, I mean in the northwest part.

Q. Maybe you don't understand me, Mrs. Franklin. I will ask you, do you live close to the highway?

A. Well, yes, fairly.

Q. About how close? A. Oh, I don't know.

Q. Just joins on the street that runs north and south, joins on your property, is that right?

A. Where the traffic signal is.

Q. Now then, Mrs. Franklin, before this accident, would you tell us about how often you would go down there and eat at this place, if you did go down and eat down there?

A. Well, I made a habit of going two or three times -- I don't know just how regularly -- I never missed a week going down there one or two times, every Sunday.

Q. Would you tell the Court and jury, if you know, whether or not other people in Ardmore went down there to eat, whether it's a common place to eat?

A. Well, I guess they did.

Mr. Smith: We believe that's infringing on the Court's decision.

The Court: Yes. Sustain the objection. I don't
508] think it makes any difference.

By Mr. Ogden:

Q. Now then, Mrs. Franklin, on the 3rd day of July, 1955, did you go or start down to this place? A. I did.

Q. Now then, when you started down there, would you tell us who you had, if anyone, in the car with you?

A. My little grandson, and a little colored girl.

Q. Little colored girl; what was the purpose of having her? A. Helping me with him that day.

Q. All right. Now you started down there at about what time of the day? A. Well, I think it was between 12:00 and 1:00 o'clock, somewhere along there.

Q. You don't know exactly?

A. I don't know exactly.

Q. Now then, about how far, if you are able to tell the Court and jury, is it from your house down to this particular place? A. Oh, I don't know, maybe a mile and a half, I reckon -- I think.

Q. Now then, you were driving from your home down there -- you were driving what direction down Highway 77?

A. South.

Q. Now would you tell us, when you arrived at or
509] near the Chicken in the Rough cafe, what you did, if anything, in driving your car; what you did, what occurred? A. Well, you see, while I was going down, the traffic was very heavy that day, and I knew that I'd have to cross the highway to get to the cafe, and drove up opposite the cafe, I think to where, the way I remember, about right even maybe with that sign. I don't know for sure, about middleways, I don't know, in front of it, I guess you would say, of the cafe on the highway, but I turned off on the west on the gravel road, and I sat there for several minutes because traffic was so heavy that I knew it wouldn't do to try to cross. I was waiting for the traffic to get calm, you know, before I undertook to cross the highway, of course.

So the traffic all just slowed down, and seemed like maybe you could pick up a pin, it had been so noisy, and I looked north and south, and north and south -- I don't know, I think three or four, maybe five times before I undertook

to cross the highway, and I did not see no car in either direction. I know I didn't.

Q. Now Mrs. Franklin, you tell the Court and jury that you sat there in your car off the highway headed to the east in front of this cafe on the opposite side of the road? A. Yes.

Q. When the traffic cleared. You kept on waiting. Were you in any particular hurry?

A No, sir; no, sir.

510] Q. And then when the traffic cleared where there was no car in sight, is that what you said, you looked?

A. I didn't see any --

Mr. Smith: Your Honor please, he's leading.

The Court: Well, no use in repeating, asking the same question.

Mr. Ogden: Surely.

By Mr. Ogden:

Q. Then would you tell the Court and jury what you then did, under those conditions? A. Well, what --

Mr. Ogden: If the Court please, Mr. Franklin -- if the Court will pardon me for repeating -- I guess I have to, to get her to understand the question.

Mr. Smith: He doesn't need to lead, your Honor.

The Court: No. What did you next do after you looked; now what was the next thing you did?

The Witness: After I saw there weren't no cars coming, I started across the highway, and the last I remember -- I thought my car was almost off the pavement when, on the east side, when they struck me. Of course I was out. That's the last I knew.

By Mr. Ogden:

Q. All right, then, Mrs. Franklin, you told the Court and jury then, this may be repetition -- but you said that

you started across here, went across the highway and thought that your car was clear off the pavement when you were hit?

A. That's the way I remember it.

511] Q. Yes, when something hit you. Then were you conscious or unconscious?

A. When something -- I don't know, I just --

Q. You don't know?

A. Uh huh, I don't remember any more.

Q. Where were you, if you know, then after you were hit there?

A. Well, all I know is what they told me after.

Q. Well, you can't tell what people told you.

A. Well --

Q. Where were you the next time that you knew anything about it; put it that way?

A. Well, I was in the Ardmore Hospital.

Q. And do you know about how long that you stayed in the Ardmore Hospital? A. Ten days.

Q. Then, Mrs. Franklin, after you left the Ardmore Hospital, would you tell the Court, please, ma'am, where you went to then? A. I went to my home.

Q. And I ask you if you required any medical assist-

512] ance? A. I had two nurses.

Q. And what kind of a bed was placed in your home?

A. Hospital bed.

Q. Now then, how long did you stay in your home with a hospital bed and nurses?

A. Well, I think we kept the nurses there about ten days, something like that, as well as I remember.

Q. Now Mrs. Franklin, do you remember when Mr. Smith came up from Texas and took your deposition in Ardmore?

A. Yes.

Q. In your home? A. Yes.

Q. Were you then in bed at that time?

A. Well, I was up and down.

Q. Now I believe the record in this case here, in the published record shows you were sued in this case on the 25th day of July. Were you still confined to your bed at that time, if you know? A. When I was sued?

Q. Yes. A. I was in bed.

Q. You were still in bed?

A. In the hospital bed.

Q. The hospital bed. Now Mrs. Franklin, do you remember Mr. Smith coming to Ardmore and taking your deposition?

513] A. I sure do.
Q. About the 10th or 13th of August following the accident in July? A. Yes.
Q. On July the 3rd, whatever time it was he took it.

Now at that time on August 11th, I will hand you this exhibit and ask you first to look at it, and ask you if at that time in his presence, I asked you to go have that picture made and to send him a copy of the picture of you.
A. Yes.
Q. And did you do that? A. Yes.
Q. Does that show the true way you looked at that time when Mr. Smith took your deposition in Ardmore?
A. That's the way, I guess so.
Q. You have looked at it, and do you know?
A. Yes.

Mr. Ogden: All right. Then we will offer that in evidence.

Mr. Smith: No objection.

The Court: All right, let it be admitted.

(Defendant's Exhibit No. 12, being photograph, was received in evidence.)

By Mr. Ogden:

Q. Now then, Mrs. Franklin, have you noticed since the accident any, have you felt any pain sensations that you didn't have prior to the accident?
514] A. I have a constant headache, got it right now. My head hurts me all the time.
Q. And Mrs. Franklin, after the accident, after you became conscious in the hospital, would you tell the Court and jury, if you know, whether or not you suffered any pain at that time? A. In the hospital?
Q. Yes. A. Oh, I was unconscious several days, and then I just suffered, my head and my shoulder, the arm and shoulder here, the ribs was broken here. Of course that was very painful.
Q. Now the doctor's, the deposition here shows you did have some broken ribs. A. Yes.

Q. Now will you describe and tell the jury any other injuries which you received and which you know about that you received in this wreck? A. I didn't get that.

Q. I say, Mrs. Franklin, do you know, would you just tell the Court and jury any injuries which you either saw or felt after that wreck that you yourself know about?

A. Oh, on myself?

Q. Yes, on yourself. A. Well, I could see on my head and I could on my knees, and two big bruises around here, you know, and this knee was cut almost to the
515] bone here, still tender.

Q. Is that your left knee? A. Uh huh.

Q. Now then, Mrs. Franklin, after that time would you tell us how you feel, how you have felt generally since that time? You said you had headaches, and are they constant or just start up and have a headache all the time or just part of the time? A. Well, nearly all the time. Now I have a day or two maybe that I don't, won't hurt, and then I will have a lot longer period of time that my head hurts so bad -- all in this side now, and right in here where the rib was so bad, it's still sore and tender, feels like pins sticking in there or something.

Q. Mrs. Franklin, would you tell the Court if there is any part of your head or body that feels numb or dead?

A. Right up here on this bone here (indicating) it's just hard and no feeling at all, just like it was petrified, I guess, the best I could explain it.

Q. All right. Now would you tell the Court and jury if you had any injury into the eyelid itself.

A. Oh, yes.

Q. Which eyelid is that? A. That was my left lid and it was cut across this way and the doctor sewed that eyelid back clear across.

516] Q. Now Mrs. Franklin, what about your glasses, were they broken or injured in the wreck?

A. Uh huh, had to get new glasses before I could be brought home from the hospital.

Q. Now do you have a scar upon your head and through your eyelid and your eye and upon your head?

A. Well, you can see part of it back in my hair.

Q. Would you mind, Mrs. Franklin, to come down here in front of the jury so you could face the jury and take off your glasses and let the jury see the condition that you have there now?

Mr. Ogden: Would there be any objection to that, Judge?

The Court: That's all right.

Mr. Smith: No objection.

By Mr. Ogden:

Q. Would you take off your glasses and point out, just take your time and point out this scar and your left eye lid --

A. It's all along here, see, scar runs back up here in my head and then the scar across here is where my eyelid.

Q. Now Mrs. Franklin, I want to ask you -- this is kind of apparently, on the left here, kind of sunken in; do you know, was that there before the accident?

A. Oh, no.

517] Q. Mrs. Franklin, I want to ask you, over here on the right-hand side where I am pointing my finger, across there appears to be a scar running clear on back in your hair, in that direction.

A. I was awful bad in this side, too. Doctor told me I had a terrible lick on this side up here, and this scar -- and it run for several days, pus ran out.

Q. Now Mrs. Franklin, of course you have hair up here: Do you know, and could you pull your hair back, if anybody wants to see, and show where the scar went back up in youer hair?

A. I don't, you can't see it for my hair.

Q. Well, I didn't know if anybody wanted to see it. You can go back there.

(Witness resumes the witness stand.)

By Mr. Ogden:

Q. Mrs. Franklin, would you tell the Court and jury, now, whether or not, about your physical condition, whether you can walk with ease or whether you get tired or how you handle yourself now? A. I get tired. I can't walk no piece without having to sit down. I get out of breath. I don't have no strength.

Q. Were you that way before you were in this accident?

A. No.

Q. Mrs. Franklin, would you tell the Court and jury about your sleeping, whether you sleep, how you sleep now at night since this accident. A. Well, I don't sleep good. I go to sleep so late, have to read to get sleepy, you know. I can't eat, losing weight all the time.

518]

Q. No appetite, losing weight; are you generally going down, you think? A. (Nods affirmatively)

Q. Mrs. Franklin, would you tell the Court whether any person, lawyer, witness, client or anybody else ever consulted you or did anything or even offered to talk to you about this case before this suit, or is that the first you knew anything about it? A. No, I didn't. No one tried to. I was in the hospital several days, --

Mr. Smith: If the Court please, I think the witness has answered the question.

The Court: Objection sustained.

Mr. Ogden: Yes, asked you for that and you already answered.

The Court: All right.

Cross Examination by Mr. Smith:

Q. Mrs. Franklin, how far did you live from the city limits of Ardmore, the south city limits?

A. I don't know, maybe, best I could say, about a mile and a half, maybe something like that.

519]

Q. You live about a mile and a half from the south city limits of Ardmore? A. Well, from this Chicken in the Rough, a half a mile from the city limits.

Q. About how far do you live from the city limits, south city limits?

A. I couldn't just tell you exactly.

Q. Do you know where the south city limit of Ardmore is with respect to where you live?

A. No; well, I sure don't.

Q. And you don't -- do you know whether you live in the city limits? A. Uh huh.

Q. You do, all right. How far do you live from the Chicken in the Rough Shack?

A. Well, about a mile and a half.
Q. About a mile and a half. A. I think that's about it. I'm just not very good on that.
Q. Not very good on that?
A. No, haven't paid much attention to it.
Q. Beg pardon?
A. I said I never paid much attention.
Q. Never paid much attention. You have lived where
520] you live for how long? A. I have lived at that place about, let's see, oh, '51, I believe.
Q. And you lived next door for how many years, north?
A. Over 35 years.
Q. All right, now Mrs. Franklin, you were driving your Cadillac automobile when the accident took place, weren't you? A. Sure.
Q. All right, and you approached that place of the accident from the north, didn't you?
A. I was going south.
Q. You were going south? A. Uh huh.
Q. All right, now when you were going south, did you get -- what part of your wheel, what part of your car did you get off the highway proper, the highway slab?
A. You mean when I stopped there?
Q. Yes. A. Well, the whole car was off the highway on the gravel on the west side.
Q. Oh the west side? A. Yes.
Q. Then you were faced which way then?
A. I was facing south.
521] Q. And you could see to the south, could you -- was there anything to obstruct your vision? A. Well, there wasn't anything particular, I guess I could.
Q. You guess you could if you looked?
A. I don't know.
Q. Beg pardon? A. No, I don't think I could see very far. I don't know.
Q. You don't think you could see very far?
A. Just don't.
Q. Now in your deposition that you testified, that you rendered in your home in August of 1955, your attorneys were present, too, at that time, weren't they?
A. My attorneys?
Q. Yes, ma'am. A. When?
Q. You told Mr. Ogden, your lawyer, that you remembered when I took your deposition in August of 1955 in your

home. A. Uh huh.
Q. And do you remember who else was there besides me at that time? A. Remember what?
Q. Do you remember who else was there when you rendered your deposition in your home on this occasion?
A. Well, it was myself and Mr. Howard and Mrs. Howard and you.
Q. And do you remember, wasn't Mr. Ogden there, too?
522] A. Yes.
Q. Now did you see that Grayhound bus, I mean that Continental bus out there that day just before the accident happened? A. No, I didn't see it.
Q. All right, I want to ask you just one or two questions, Mrs. Franklin, when I took your deposition, on page 23 of the deposition, Mr. Ogden:

The question was, this is the first one:

"Question: Mr. Shelton could see just the same as you could see, couldn't he?
"Answer: Sure, could."

That was asked by Mr. Ogden. Do you remember that?
A. Yes.
Q. And that is still your testimony, isn't it?
A. I don't get what you mean there.
Q. I am just asking you, I am reading from the deposition that was taken in your home which you have testified to, Mrs. Franklin, in August of 1955. A. Uh huh.
Q. And I have just read a question that was asked you by your lawyer and an answer that you gave, and I asked you if that was still your opinion. A. Yes.
Q. All right, I want to ask you this other one:
523]
"Question: There wasn't anything to block his view. Do you know whether there's a hill back to the south, where he would be coming up over a rise?"

You answered:

"Answer: There is sort of a little hill back that way, I think, that you can't see cars coming, a rise place."

Do you know anything more now than you did then about that?

A. No.
Q. I beg pardon? A. No.
Q. You don't know how far from you Mr. Shelton was when you started your left turn in front of him, do you?
A. How could I -- I didn't see, didn't know the Shelton car -- wasn't no cars coming when I went to turn.
Q. All right. A. Not one in sight.
Q. So you don't know then how far down the road he could have been? A. Didn't see him.
Q. And you don't know how far down the road the bus was when you turned to the left in front of Mr. Shelton?
A. Didn't see no bus.
Q. Now you don't know anything about how far behind you there were any automobiles coming?
A. No, I didn't see no cars behind me.
524] Q. You don't know anything about how many cars were on the east side of the highway slab, waiting to get on the highway, do you? A. No, I don't.

Mr. Smith: That's all, your Honor.

Redirect Examination by Mr. Ogden:

Q. I want to ask you, Mrs. Franklin, did you or are you able to estimate about how fast you went across the highway? A. No, I don't -- of course, I couldn't have been going fast. I didn't have room to go fast, just the distance I was going across there, you know.
Q. You started from a dead stop? A. Yes.
Q. Now Mrs. Franklin, I forgot to ask -- may I ask you now: About how long have you driven automobiles?
A. Oh, over 35 years.
Q. And have you had any accident prior to that time?
A. No, that's the first time I was ever hit.

Recross Examination by Mr. Smith:

Q. Now Mrs. Franklin, the Cadillac automobile you were driving, you had owned that Cadillac a good while, hadn't you? A. I bought that Cadillac -- it was a '53 model, I believe, in '54.
525] Q. Bought it in '54? A. As well as I remember, might have been in the late part of October or November.
Q. In other words, it was about a year old when you

got it, is that your testimony? A. Yes.
Q. What kind of a gearshift did it have on it?
A. Oh, it had an automatic.
Q. All you had to do is just step on the gas?
A. Well, yes.
Q. To start you up? A. Uh huh.

Mr. Smith: That's all.

The Court: All right, you may step down.

Mr. Ogden: Just one question.

Redirect Examination by Mr. Ogden:

Q. When you say "automatic", it's just like any of these cars now that you don't have to change gears on, you just --

Mr. Smith: We object to that.

The Court: Objection overruled. Go ahead.

By Mr. Ogden:

Q. (Continuing) Any of these that you don't have to change gears, just step on the brake and stop, and when you get ready to go, you take your foot off the brake and
526 | step on the gas and start; that's what you mean by automatic? A. That's right.

Mr. Ogden: That's just an ordinary car, that's all.

The Court: All right, you may step down.

Mr. Ogden: That's all, your Honor, please.

The Court: You rest?

Mr. Ogden: Yes, sir, I'd like to have one other witness. Would you mind to call Mrs. Williams back for just one question that I overlooked?

(There is a conference at the bench out of the hearing of the jury, during which these proceedings were had:)

The Court: Maybe you can stipulate.

Mr. Ogden: If this witness were permitted to testify, she would testify that she operates a very large eating establishment and employs 16 people, that it runs 24 hours a day, and never closes day or night, and that she is in a general way well acquainted with her customers, and that a minimum of seventy-five percent of her customers live in Ardmore or thereabouts and come to her place from the north to the south.

The Court: That wouldn't prove anything in this case, Judge. You object to it?

527] Mr. Smith: Yes, your Honor.

The Court: Objection sustained.

Mr. Ogden: To which we except.

Could I show that she doesn't close day or night?

The Court: No.

(The following again in the hearing of the jury)

R. A. HOWARD, recalled as a witness on behalf of the defendant, resumed the stand and testified further as follows:

Direct Examination (Continued) by Mr. Ogden:

Q. Mr. Howard, I will ask you if you saw the automobiles involved in this collision, Nash station wagon and the Cadillac automobile, after the collision?

A. I did.

Q. And did you look at them over there, Mr. Howard?

A. I did.

Q. And I will ask you if you are able to look at Exhibit No. 11 and tell the Court whether or not that is a

true photograph of the Cadillac car taken at that time and that condition.

528] Mr. Smith: We object to that, your Honor please.

The Court: Sustain the objection. No use asking those questions. You have to have the photographer here so he can cross examine him. He doesn't agree to it. You can't prove it that way.

Mr. Ogden: Well, anyhow, if the Court please, may we let the record show in private what he would testify to?

(The following at the bench out of the hearing of the jury:)

Mr. Ogden: The witness, if permitted to testify, would testify that he was familiar with the cars, that he looked at them, and that these pictures are true and correct photographs of the conditions of the automobiles at that time shortly after the wreck and the condition after the wreck.

The Court: Exhibit what?

Mr. Ogden: That's Exhibits 9, 10, and 11.

Mr. Mountcastle: To which we object.

The Court: All right, objection sustained.

(The following again in the hearing of the jury)

Mr. Ogden: Now, I believe, if your Honor please, the defendant rests.

* * * * *

529] CECIL CRAWLEY, recalled as a witness on rebuttal in behalf of the plaintiffs, testified as follows:

Direct Examination by Mr. Smith:

Q. State your name, please, sir.

A. Cecil Crawley.
Q. You have testified heretofore in this case?
A. Yes, sir.
Q. You are the bus driver of the Continental on the date of the accident? A. Yes, sir.
Q. Testimony has been introduced, Mr. Crawley, by Mr. Howard, an attorney for Mrs. Franklin, to the effect that when you were with him out there at the scene of the accident following the accident, you made a statement something along this line, that you had been expecting something like that to happen before it happened.

I will ask you to state whether or not you remember any statement to that effect having been made by you.

Mr. Ogden: If your Honor please, Mr. Howard did not testify that they were at the scene of the accident, said he went to the bus station.

530] The Court: That's correct. He said he was at the bus station.

Mr. Smith: At the bus station; then let me amend my question and say at the bus station.

By Mr. Smith:

Q. Did you make that statement, did you make such a statement as that down at the bus station?
A. I did not.

Mr. Smith: That's all.

Mr. Ogden: That's all.

(Witness withdraws)

The Court: All right, you rest?

Mr. Smith: Your Honor, the plaintiff rests.

Mr. Ogden: We rest.

* * * * *

532] The following again in the hearing of the jury

(Whereupon Mr.Mountcastle proceeds with his argument, at the close of which the following occurs:)

Mr. Ogden: If your Honor please, I think they have to present their whole matter so I can answer. I am positive that the rule provides that.

Mr. Smith: If the Court please, I object to counsel talking before the jury.

(The following at the bench out of the hearing of the jury)

Mr. Ogden: Comes now the defendant and shows to the Court that Mr. Mountcastle stated that, to the jury, he would argue the question of liability or negligence, and that Mr. Smith would argue the amount of damages, and only used five minutes, leaving Mr. Smith 25 minutes, and the defendant now requests the Court to direct Mr. Smith to make such argument as he deems proper, or rather Mr. Mountcastle, on the questions to be presented in the damage suit so that there will not be something that I cannot answer. I am requesting that the Court require that argument.

The Court: Well, overruled.

Mr. Mountcastle: Mr. Smith will close.

(The following again in the hearing of the jury)

(Mr. Ogden makes his closing argument to the jury, following which Mr. Smith makes his closing argument.)

533] Charge To The Jury

The Court: As mentioned earlier, the plaintiffs bring this action to recover for injuries and damages suffered from a collision between plaintiffs' station wagon and a car being driven by the defendant. The accident occurred just south of the city limits of Ardmore, Oklahoma, on Highway No. 77. Plaintiff J. D. Shelton, husband of plaintiff

Venera Shelton, and father of Larry, Robert, Pamela and Anita, minors, was driving the station wagon at the time of the accident.

Plaintiffs urge that the instant collision was caused by the defendant's negligence in suddenly cutting across in front of plaintiffs' vehicle, granting plaintiff, Mr. Shelton, no opportunity to avoid an impact. Plaintiffs specifically assert that the defendant, Mrs. Franklin, was negligent in failing to keep a proper lookout, in operating her car at a dangerous rate of speed considering the existing circumstances, and in failing to yield the right-of-way to plaintiffs' car.

The defendant denies that she was in any way guilty of carelessness and asserts that the driver of plaintiffs' station-wagon was negligent in driving at an excessive
534] speed; in failing to keep a proper lookout; in failing to keep his car under control so as to be able to "stop within the assured clear distance ahead; in failing to yield the right-of-way to the defendant; in failing to have the brakes of his vehicle in proper working order; and, in failing generally to exercise ordinary care.

In addition, the defendant urges that plaintiffs Mr. and Mrs. Shelton were on a joint journey so as to make the negligence of Mr. Shelton imputable to Mrs. Shelton. And, further asserts that Mrs. Shelton was herself guilty of carelessness in not taking that care for herself a reasonably prudent passenger would have; and, specifically alleges, that Mrs. Shelton should have warned Mr. Shelton of the approaching danger and admonished him not to drive in a negligent manner.

By way of counter-claim the defendant asks to recover for personal injuries she received from this accident.

535] It is my duty, as judge, to instruct you on the law; it is then your duty as jurors, to apply the law to the facts which you find exist from the evidence introduced.

The allegations of the parties are not evidence, in any respect; they merely define the issues to be tried and do not raise the slightest presumption as to the true facts

in the case. The introduced evidence must be your sole guide in arriving at the actual facts in this case.

Each party to this action has the burden of proving his or her affirmative allegations by a fair preponderance of the evidence. A "fair preponderance" of the evidence is that proof which satisfies your minds as to its truth when weighed against the opposing evidence; it does not mean, necessarily, the greater number of witnesses.

Thus, for the plaintiffs to recover from the defendant they must establish by this just mentioned measure of proof, that the defendant was negligent, and that her negligence was the "proximate cause" of the complained of collision.

And, if the plaintiffs make such proof, in order to then prevent Mr. or Mrs. Shelton from recovering verdicts against her, the defendant, Mrs. Franklin, must establish by a fair preponderance of the evidence that Mr. or Mrs. Shelton were guilty of "contributory negligence".

For Mrs. Franklin to recover on her counter-claim, she
536] must establish by a fair preponderance of the evidence that the plaintiff, Mr. Shelton, was guilty of negligence which was the proximate cause of this accident.

"Proximate cause", as used in these instructions, means the cause which in natural and continuous sequence, without the intervention of any other cause, produced the injury, and without which the result would not have happened. For an action of negligence to be deemed the "proximate cause" of an injury, the injury sustained must be such as could have reasonably been foreseen by an ordinarily prudent person.

"Contributory negligence" may be defined as "an act or omission by the one seeking to recover, amounting to a lack of ordinary care and prudence, which cooperating or concurring with the negligence of the one sued, becomes the proximate cause of the complained of injury.' A proper consideration is whether or not the person and persons seeking to recover damages took the precaution for his or her own safety that an ordinarily prudent person would have under like conditions.

537] You are advised that the Oklahoma Law provides in part:

1. "Any person driving a vehicle on a highway shall drive the same at a careful and prudent speed not greater than, nor less than is reasonable and proper, having due regard to the traffic, surface and width of the highway and of any other conditions then existing, * * *"

2. "No person * * * shall turn a vehicle to enter a private road or driveway, or otherwise turn a vehicle from a direct course, or move right or left upon a roadway, unless and until such movement can be made with reasonable safety. No person shall turn any vehicle without giving an appropriate signal in the manner hereinafter provided. (1) A signal of intention to turn right or left, slow or stop, when required. shall be given continuously during not less than the last one hundred feet traveled by the vehicle before turning, or stopping. For turning left the hand and arm are to be extended horizontally."

3. "No person shall start a vehicle which is stopped, standing, or parked, unless and until such movement can be made with reasonable safety."

4. "All vehicle operators must keep a proper lookout and at all times exercise that degree of care that a reasonably prudent person would under similar conditions."

Therefore, if you find by a fair preponderance of the evidence that the defendant (1) was not driving "at a careful and prudent speed" in view of the existing conditions; or, (2) turned her vehicle from a direct course when such movement could not be made with reasonable safety, or, turned left without giving the required signal "not less than the last one hundred feet traveled by the vehicle before turning, or stopping", or (3) started her vehicle from a standing position when such movement could not be made with reasonable safety; or, (4) failed to keep a
538] proper lookout or otherwise fail to exercise ordinary care under the existing circumstances, any such failure or failures would constitute negligence on her part, and if such negligence was the sole proximate cause of the complained of accident, then your verdict should be in

favor of all the plaintiffs.

You are further instructed that Oklahoma Law requires that "* * * no person shall drive any vehicle upon a highway at a speed greater than will permit him to bring it to a stop within the assured clear distance ahead;"

Therefore, should you find by a fair preponderance of the evidence that plaintiff, J. D. Shelton:

(1) was driving at a speed which was greater than was reasonable and proper under the existing conditions; or, (2) failed to keep a proper lookout; or, (3) failed to keep his car under control so as to be able to "stop within the assured clear distance ahead; or, (4) failed in any way to exercise ordinary care and prudence in his driving, any such failure or failures would constitute negligence on the part of Mr. Shelton, and if such negligence was the sole proximate cause of this accident you should find for the defendant, Mrs. Franklin, on her counter-claim.

However, you are further advised that in connection
539] with Mr. Shelton's duty to drive so as to be able to stop within the assured clear distance ahead, such does not mean that he had an absolute duty to drive in such a manner as to be able to stop and avoid any type of impact under any condition. Whether the plaintiff, Mr. Shelton, was driving so as to be able to stop within the assured clear distance ahead must be determined by you as a matter of fact from all the evidence; and, in this regard you are entitled to consider another applicable law which gives a driver, such as Mr. Shelton, the right to assume that others will use the highways lawfully, in determining his speed and ability to stop within the assured clear distance ahead.

540] You are instructed that where the driver of an automobile, without any fault on his part, is placed in a position of imminent peril by another vehicle, the law will not hold him guilty of such negligence as to defeat his recovery for injuries received in an ensuing collision because he does not select the very wisest course, and an honest mistake of judgment in such a sudden emergency will not of itself constitute contributory negligence, although another course might have been better and safer. The proper

test is whether or not such driver exercised that judgment which a reasonably prudent person would have where no time for deliberate judgment existed because of the sudden emergency.

541] You are further advised that the mere existence of the marital relation between husband and wife does not impute a husband's negligence, if any, to a wife seeking recovery for her injuries.

In this connection you are instructed that there is no evidence that Mrs. Shelton shared with Mr. Shelton an equal right to direct and control the movements and conduct of each other, with a voice or right to be heard in the control and management of the automobile, and, consequently, the court hereby rules as a matter of law, that the negligence, if any, of Mr. Shelton, is not imputable to Mrs. Shelton, as to her claim.

542] As just mentioned it is a general rule that the negligence, if any, of the driver of an automobile is not imputable to the passengers in the car, where such passengers have no right of control over the management and operation of the car; but the question of whether or not such passengers were negligent and whether their negligence contributed to the collision and resulting injuries must be determined by you according to all of the facts and circumstances as disclosed by the evidence. Naturally, the four minor children, plaintiffs in this action, cannot be charged with negligence, under the introduced evidence. However, as to Mrs. Shelton, if you find that from the evidence that she at any time while in a place of safety realized, or by the exercise of ordinary care should have realized, that the automobile in which they were riding was approaching impending danger, or, that the driver of the station-wagon was not using due caution and care for the safety of himself and his passengers, then it became the duty of Mrs. Shelton to warn her husband of such impending danger or admonish against the careless driving or to exercise such means to avoid injury that an ordinarily prudent person would have under similar circumstances, and her failure so to do would be "contributory negligence", and she could not recover for her injuries. Naturally, if Mr. Shelton was in no way negligent, Mrs. Shelton could not be guilty of "contributory negligence".

543] You are further instructed that the law recognizes what is termed as an "unavoidable accident or casualty", that is an accident which occurs in which no one is guilty of negligence.

Naturally, if you find that in the instant accident neither the plaintiff, Mr. Shelton, nor the defendant, Mrs. Franklin, were guilty of negligence, but that this accident was "unavoidable", then none of the suing parties can recover.

544] Thus, in resume, you are instructed:

1. If the defendant's negligence caused this collision, you should find in favor of all six plaintiffs.

2. If Mr. Shelton's negligence caused this accident, you should find for the defendant on her counter-claim.

3. If the negligence of the defendant, Mrs. Franklin, and of the plaintiff, Mr. Shelton, combined to cause this accident, neither Mrs. Franklin nor Mr. Shelton can recover damages. However, the four minor children would be entitled to verdicts against the defendant. And, if Mrs. Shelton were not hereself guilty of "contributory negligence" she would be entitled to recover from the defendant. However, if Mrs. Shelton was guilty of "contributory negligence" she cannot recover.

4. If this accident was "unavoidable", you should find in favor of the defendant on plaintiffs' complaint and, in favor of the plaintiff on defendant's counter-claim.

545] Should you find for the plaintiff, J. D. Shelton, you should award him such an amount as will fairly and justly compensate him for the injuries which you find directly and proximately flowed from the negligence of the defendant. This must not exceed $112,190.00, the sum sued for. In determining the amount to be granted Mr. Shelton, if any, you may consider the physical and mental pain and suffering endured up to this time and that which may reasonably be expected in the future -- the loss of earning power, both past and future, and medical and hospital expenses both past and that reasonably to be expected in the future, if any.

Should you find for the plaintiff Venera Shelton, you should grant her that amount which will fairly and justly compensate her for the injuries she received in this accident, not to exceed the sued for sum of $31,429.00. In determining the amount of Mrs. Shelton's award, if any, you may consider the physical and mental pain and suffering endured up to this time and that which may reasonably be expected in the future, loss of earning power, both past and future, if any, and medical and hospital expenses both past and that reasonably to be expected in the future, if any.

546] Should you find for the four minor plaintiffs in this action you should award each of them that amount which you deem will fairly and justly compensate each of them for the pecuniary loss each has suffered because of this accident. However, the amounts of these awards must not exceed the sued for sums, which are: (1) For Larry Shelton, $53,500.00; (2) For Robert Shelton, $10,380.00; (3) For Pamela Shelton, $5,000.00; and (4) For Anita Shelton, $5,000.00.

In determining the amount of these awards you may consider the physical and mental suffering which each has undergone in the past, and reasonably will in the future, because of their injuries; the pecuniary loss each will in all probability suffer after reaching the age of 21 years, if any, because of these injuries; and, the reasonable and necessary costs of hospital services and the services of physicians from and after the date of this accident.

547] Should you find for the defendant, Mrs. Franklin, on her counter-claim you should award her such a sum as will fairly and adequately compensate her for the injuries she received because of Mr. Shelton's negligence, if any. However, this award must not exceed the requested sum of $105,973.50.

In determining the amount of her award, if any, you may consider the mental and physical pain and suffering, past and future, arising from this accident -- her loss of earning power, past and future, if any, and medical and hospital expenses, both past and future, arising out of this accident.

548] Testimony has been given by men termed by the law - "expert witnesses". Although the law recognizes and receives the testimony of men whose opinions are based on knowledge gained through study and experience in a specific field, the ultimate weight to be given their testimony is to be determined by you. You are not required to surrender your own judgment to that of any person testifying as an expert witness. However, the testimony of an expert, like any other witness, is to be given such weight as you think proper when you determine the facts in this case.

549] You are the sole judges of the facts and of the credibility of the testifying witnesses. In weighing and evaluating the testimony of the witnesses you may consider their demeanor on the witness stand, their interest, if any, in the results of the case, their bias and prejudice or fairness and candor, the probability or improbability of their statements, their character, and all other facts in evidence before you.

Where possible you should reconcile all the testimony. However, where there is a direct conflict, you should carefully use the standards just mentioned in determining who is stating the truth. The truth is not necessarily with the majority of the witnesses. You may choose to believe one rather than a great number, although the number may be considered along with the other circumstances.

If you find any witnesses have wilfully testified falsely to a material fact, you may disregard the whole or any part of their testimony which you deem unreliable.

550] Your verdict must be based on facts disclosed by the evidence. Certainly, mere speculation or prejudice brought about by sympathy should not enter in.

Each of you should decide the case yourself, but you should do this only after a careful consideration of the case with your fellow jurors. Although you should not surrender your honest convictions concerning the effect or weight of evidence for the mere purpose of returning a verdict or solely because of the opinion of other jurors, you should not hesitate to change your opinion when convinced it is in error. An agreement should be reached if you can do

so without doing violence to your individual judgment.

It will take the concurrence of all twelve of you to return a verdict in this case. After you retire, select one of your members as foreman to preside over your deliberations. When your verdict is reached the foreman alone need sign it.

Ladies and gentlemen, you will notice that five alternative verdicts have been handed you. From these five you will select one to return as your verdict.

(Both sides waive swearing of the bailiff and the jury withdraws.)

551| (Jury recalled immediately upon leaving the court room and the following instructions given:)

Ladies and gentlemen of the jury, the Court calls attention to the fact that if you find for the plaintiff, Shelton, and the family, the medical expenses amounted to, it has been stipulated, $2,715.00; and if you find for the plaintiff, Shelton, it is stipulated that the damage to his Nash was $600.00.

Also, the Court calls attention to the fact that in this zone where he was traveling, the speed allowed by law by the State of Oklahoma was 65 miles per hour, but you have to take into consideration the other instructions that the Court has given you with regard to the conditions, circumstances, prevailing at that particular time. It doesn't mean that a man can drive 65 miles per hour in any zone, but that was the speed limit at that time in the daytime, in Oklahoma.

All right, you may go to your jury room.

552| Exceptions By Defendant To Jury Charge

Mr. Ogden: If the Court please, on page 5 of these instructions, beginning with the last paragraph, we think it is not proper under the circumstances because we think that the testimony of the defendant shows she stopped, and didn't

have to give a signal for a turn left.

The Court: Of course, there is proof, you know, the other way. It is in controversy, but I had to give an instruction on it.

Mr. Ogden: The last instruction, your Honor please, on page 6, beginning with the last paragraph on page 6 and continuing on page 7, I don't think that's a proper one. That is the one, Judge, saying that he had a right to assume that everybody, that others on the highway would use the highway lawfully in determining speed and the ability to stop within the assured clear distance ahead. I don't know that that is the law, if the Court please, that he had the right to assume that.

The Court: Well, we will allow you an exception on that.

Mr. Ogden: The point on page 8--it is not numbered. It's about an emergency situation. I think that that instruction standing alone would not be proper, but if the Court would put in there that if he did anything to bring about his condition of peril, why then he couldn't, you know, he wouldn't be bound.

553] The Court: You can take an exception to it.

Mr. Ogden: Now if the Court please, I would like to except to 8-A.

The Court: All right.

Mr. Ogden: That is about the imputed negligence.

The Court: All right.

Mr. Ogden: And then 9 is on the same situation, Judge. I think I must protect myself on my theory about it, you know.

The Court: Yes, all right.

Mr. Ogden. To protect the record, I think that's all I want to get in on this.

I want to make a motion: Comes now the defendant at the close of all the evidence and moves the Court to instruct the jury to return a verdict in favor of the defendant as to the alleged cause of action between the plaintiff, Mrs. Venera Shelton, and the defendant, as between those two girls, whatever those two girls' names are -- Pamela and Anita; that is, the action brought by their next friend as to Mrs. Franklin because of the fact that there is no evidence of any kind showing or tending to show, or any competent evidence showing any injuries, that is medical evidence, Judge; and move for an instructed verdict.

The Court: All right; overruled.

554] (The jury, having waited but not hearing the foregoing, went to the jury room to consider its verdict.)

(During the time the jury is out considering its verdict, the jury requested that the following testimony be read, and in the presence of the attorneys for both sides and the Court, it was so read:)

Excerpts from testimony of J. D. SHELTON read to the jury at their request:

(Excerpt from direct examination by Mr. Smith:

"Q. Mr. Shelton, would you tell us, please, sir, when you first saw the Cadillac automobile that collided with your car? A. Yes, sir.

"Q. Would you tell us, please, sir, about the path -- come over to the map, please, sir, and just tell us which is north on this map. A. This right here.

"Q. All right, sir. Which is east on the map?

"A. This right here. (Indicating)

"Q. Where is the Chicken Shack? A. Right here.

"Q. Now would you tell us, please, sir, about where Mrs. Franklin was when you saw her and about what route she took in her Cadillac automobile after you saw her?

555] "A. She was, when I first saw her, she was right along here. (Indicating) And she pulled down this way and pulled off with the right wheels off of the edge of the pavement there, and after she pulled off she ran right around in front of me just like that. (Indicating)

"Mr. Ogden: Pardon me, please. It would be all right if he would take a pencil and make a mark there.

"A. (The Witness, continuing) She was going when I saw her, she was right along there this way and veered off the highway to the edge like that and just went around in front of me just that way. (Indicating)

"By Mr. Smith:

"Q. You may return to your seat. Tell us, please, sir, what parts of her car she got off the hard surface slab.

"A. She got the right wheels.

"Q. The right wheels of her Cadillac? A. Yes, sir.

"Q. All right. Were you where you could see the woman in the Cadillac? A. Yes, sir.

"Q. Did she make or execute any signs, turn or any
556] signs? A. No, sir.

"Q. Did she look in either direction before she pulled to the left across in front of you? A. No, sir.

"Q. The position that the cars are now placed in, which were placed by Trooper Williams yesterday, tell us whether or not they represent the condition the automobiles were in generally after the accident.

"A. Yes, sir, after the accident.

"Q. Mr. Shelton, was there, would you tell us about how far back south of Mrs. Franklin's Cadillac that you were in your station wagon when she shot to the left in front of you? A. Well, I'd say around 100 feet.

"Q. Is that an estimate, or have you measured, made any measurements or anything?

"A. That's an estimation.

"Q. All right, sir. Could it vary some?

"A. Yes, sir.

"Q. Would you tell us, please, sir, about how far behind you the bus was at that time?

"A. He was approximately 150 to 200 feet."

* * * * *

557] (Excerpt from cross examination of J. D. Shelton, by Mr. Ogden:

"Q. Now then, would you mind to tell us where you were, I think you did, told Mr. Smith where you were, when you first saw the Franklin car, with reference to, we'll say, the Chicken in the Rough restaurant.

"A. About 150 feet down.

"Q. Down the road from that. So then that would be about 150 feet south, would it not? A. Yes, sir.

* * * * *

"Q. Then would you please return to the stand now, Mr. Shelton, if you don't mind.

"During that time you also said that the bus was about 150 feet back of you, is that right? A. Yes, sir."

(The jury returns to the court room at 7:05 p.m. at their own request, with the attorneys present.)

The Court: Mr. Foreman, I don't want you to tell me now under any circumstances how you stand, but have you arrived at a verdict?

Jury Foreman: Your Honor, we have not arrived at a verdict on any of the points or claims of the case.

The Court: Well, of course we have got a serious sit-
558 | uation here. We have tried the case, you know, for about two and a half days.

I am not going to force you to bring in a verdict or anything like that, and you have been in session for four hours. Lots of times men and women I have had on juries have been in session much more and yet finally arrived at a verdict.

(The Court briefly confers with one of the jurors as to what time he can come back in the morning, because of sickness in his family.)

* * * * *

560] [Plaintiffs' Requested Instructions.]

Instruction No. ___

You are instructed that where the driver of an automobile, without any fault on his part, is placed in a position of imminent peril by another vehicle, the law will not hold him guilty of such negligence as to defeat his recovery for injuries received in an ensuing collision because he does not select the very wisest course, and an honest mistake of judgment in such a sudden emergency will not of itself constitute contributory negligence, although another course might have been better and safer.

Given W. R. Wallace
Judge

4 Blashfield, Part 2, § 2733, page 247

561] Instruction No. ___

You are instructed in this connection in the absence of notice to the contrary, the operator of a motor vehicle is entitled to assume that others will obey the law of the road and will give a signal or warning before turning or deviating from their course, or stopping, or starting and will exercise ordinary care, or use their senses or the means that the law requires them to use to safeguard others and avoid accidents.

Given in substance W. R. Wallace
Judge

4 Blashfield Part 2, page 234, § 2732

562] Instruction No. ___

You are instructed that it is the law that one placed in a position of sudden emergency or peril by the negligence of another, and not by his own negligence, is not held to the same degree of care and prudence as one who has time for thought and reflection. Thus, if one finds himself in a position of sudden peril and acts as a person of ordinary prudence would act under such circumstances, the jury may

find him free from negligence or contributory negligence, although he might have been able to avoid the accident under less pressing circumstances.

Given in substance W. R. Wallace
Judge

132 F 2d 834, Car & General Ins. Corporation v. Keal Driveway Co.

563] Instruction No. ___

You are further instructed that the doctrine of imputed negligence as between parent and child is rejected in Oklahoma and that means that even though you were to find that the plaintiff, John D. Shelton, was guilty of negligence that negligence could not be charged to the co-plaintiffs, Pamela Shelton, Larry Shelton, Anita Shelton and Robert Shelton; there being no dispute that these last four named plaintiffs are the sons and daughters of John D. and Verena Shelton.

Given in substance W. R. Wallace
Judge

Lone Star Gas Company vs Parsons, 14 P.2d 369, (195 Okl. 52)

564] Instruction No. ___

You are further instructed that where motorists are proceeding in opposite directions on the same highway, and each was on his proper side of the road, each motorist could assume that the other would not suddenly make a left turn.

Refused W. R. Wallace
Judge

169 F.2d 199, Gross et al. vs. Gross (10th circuit)

565] Instruction No. ___

You are instructed that the negligence of a driver of an automobile is not ordinarily imputed to a mere guest or

passenger who is riding in the automobile but has no authority or control either over the automobile or the driver thereof.

Covered

W. R. Wallace
Judge

566] Instruction No. ___

You are further instructed that if you find from a fair preponderance of the testimony that the defendant in this case failed to yield the right of way and further find that such failure was the proximate cause of plaintiffs' injuries and the damages resulting therefrom and further find that the plaintiffs themselves were not negligent, then in that event it is your duty to find for each of the plaintiffs in such sum as will reasonably compensate them for the injuries sustained.

Covered

W. R. Wallace
Judge

567] Instruction No. ___

You are further instructed that the mere existence of the marital relation between husband and wife does not impute husband's negligence to wife seeking a recovery for injuries occasioned to her.

And in this connection you are further instructed that the negligence of the driver of an automobile is not ordinarily imputable to a mere guest or passenger who is riding in the automobile but who has no authority or control either over the automobile or the driver thereof.

Given in substance

W. R. Wallace
Judge

Lakeview, Inc. vs. Davidson, 26 P.2d 769 (166 Okl. 171)
Shefts Supply Company vs. Purkapile 36 P.2d 275, (169 Okl. 157)
Wagoner vs. McKernan, 177 P.2d 511, (198 Okl. 425)

Franklin v. Shelton et al.

568 Instruction No. ___

You are instructed that the laws of Oklahoma with reference to turning, slowing and stopping are as follows:

Title 47, O. S. A. § 121.5 (d). "No person shall turn a vehicle at an intersection, unless the vehicle is in proper position upon the roadway as required in paragraph (a), or turn a vehicle to enter a private road or driveway, or otherwise turn a vehicle from a direct course, or move right or left upon a roadway, unless and until such movement can be made with reasonable safety. No person shall turn any vehicle without giving an appropriate signal in the manner hereinafter provided." Yes*

The statute further provides:

"(1) A signal of intention to turn right or left, slow or stop, when required, shall be given continuously during not less than the last one hundred (100) feet traveled by the vehicle before turning, or stopping." Yes*

The statute further provides:

"(e) Any stop or turn signal when required herein shall be given either by means of the hand and arm, or by a signal lamp or lamps, or mechanical device of a type approved by the Department." Yes*

"(f) All signals herein required given by hand and arm shall be given from the left side of the vehicle in the following manner and such signals shall indicate as follows:

(1) Left turn -- Hand and arm extended horizontally. Yes*

(2) Right turn -- Hand and arm extended upward.

(3) Stop or decease speed -- Hand and arm extended downward with palm to the rear."

The laws of Oklahoma further provide:

Title 47, O. S. A. § 121.3. Speed. "(c) The speed limit for all motor vehicles not governed in any other

provision of this Act by a specific set speed shall be sixty-five (65) miles per hour during the hours of day and fifty-five (55) miles per hour during the hours at night, however, such vehicle shall at all times conform to the requirements of paragraph (a)." No*

(a). "Any person driving a vehicle on a highway shall drive the same at a careful and prudent speed not greater than nor less than is reasonable and proper, having due regard to the traffic, surface and width of the highway and any other conditions then existing, and no person shall drive any vehicle upon a highway at a speed greater than will permit him to bring it to a stop within the assured clear distance ahead; * * *"

Title 47, O. S. A. 1953, § 121.6, subsection (e) provides the driver of a vehicle about to enter or cross a highway from a private road or driveway shall yield the right of way to all vehicles approaching on said highway. No*

See Cumulative Pocket Part 1955 O. S. A.

Given in part W. R. Wallace, Judge

* Handwritten notations appearing on right margin.

569] Instruction No. ___

You are further instructed that contributory negligence of a driver of a car is imputable to the one riding as a guest or passenger only where the relation of master and servant, principal and agent, exist or where partners are engaged in a joint enterprise.

You are further instructed in this connection that the doctrine of imputed negligence arising in case of joint enterprise generally applies only where the parties have a community of interest respecting manner of operation of the automobile and where each has some control over the operation thereof.

And in this connection you are told that in order to constitute a "joint enterprise" there must not only be a community of interest in the objects and purpose of the under-

taking but also an equal voice or right of direction and control of the automobile, and a guest having no share in operation and control of the vehicle is not engaged in a joint enterprise with the operator.

Clyde & C. v. Dyess, 126 F.2d 719 (10th circuit)

You are therefore instructed, gentlemen of the jury, in this case that the burden of proof of negligence on behalf of the plaintiff must be borne by the defendant and unless you find that Venera Shelton was an agent or employee of the plaintiff, John D. Shelton, and unless you further find that she had an equal right or voice in the direction and control of the automobile, then the negligence of the driver of the car, John D. Shelton, [illegible] is not to be charged to the plaintiff, Venera Shelton, unless you find they were on a joint enterprise as herein defined above.

Covered

W. R. Wallace
Judge

570] Instruction No. ___

You are further instructed that if you find from a fair preponderance of the evidence that the defendant in this case violated the statutes of Oklahoma with reference to operation of a vehicle on a public roadway that that would constitute negligence per se, in other words negligence of itself, and in this connection if you further find that the defendant did violate said statutes in making the left hand turn or attempting to cross the highway opposite the Chicken in the Rough restaurant on Highway 77 South of Ardmore, Oklahoma, and that said violation was the proximate cause of the collision and the damages resulting thereto to the plaintiffs as shown by the evidence and that the plaintiffs were free from negligence, then in that event your verdict should be for the plaintiffs and against the defendant.

Given in substance

W. R. Wallace
Judge

156 P.2d 618, Burton v. Harn, (195 Okl. 322)
Smith v. Welch, 189 F.2d 832 (10th circuit)

Franklin v. Shelton et al.

Bass vs. Ray, 101 F.2d 316 (10th circuit)
4 Blashfield § 2681

571] Instruction No. ___

You are further instructed that the driver of a vehicle desiring to make a left turn across a highway, between intersections, should exercise extra precaution before attempting it, as such turns are less frequent than at intersections, and therefore not anticipated to the same extent by other motorists.

Refused W. R. Wallace
Judge

Caesar v. Phillips Petroleum Co. 104 P.2d 429, (187 Okl. 559) citing other Oklahoma cases and 2 Blashfield Cyclopedia of Automobile Law and Practice, Perm. Ed., pp. 283, 315, 316, §§ 1121, 1170, 1171.

Cited with approval Berbohn vs. Pinkerton, 255 P.2d 260, 263, (208 Okl. 242)

572] Instruction No. ___

What sum, if any, if paid now in cash, do you find from a preponderance of the evidence, would be a fair and reasonable compensation to the plaintiff, Verena Shelton, for the personal injuries, if any, proximately sustained by her on the occasion in question in this case?

Answer in dollars and cents, if any.

Answer $_____.

In connection with this question you are charged that if you find from a preponderance of the evidence that the plaintiff, Verena Shelton, as a result of such injuries, if any, has been up to this time prevented from laboring and earning money, you may take that into consideration in finding the damages, if any; and if you further find from a preponderance of the evidence that as a result of said personal injuries so caused, if any, plaintiff, Verena Shelton has suffered physical pain, you may take that into consideration

in answering this question; and if you further find from a preponderance of the evidence that the plaintiff Verena Shelton has not recovered from her injuries so caused, if any, and that her ability to work and labor in the future has been impaired, you may take that into consideration in answering this question; and if you further find from a preponderance of the evidence as a result of plaintiff Verena Shelton's injuries, so caused, if any, it was reasonably necessary for her to have hospital services and the services of a physician, you may also take into consideration the fair and reasonable cost of such hospital and medical services, so reasonably necessary; and if you further find from a preponderance of the evidence that plaintiff, Verena Shelton will reasonably and probably suffer physical pain in the future as the result of her injuries, so sustained, if any, you may take that into consideration in answering this question. In answering this question you may take into consideration only the elements of damages, if any, set out above.

Covered

W. R. Wallace
Judge

573] Instruction No. ___

What sum, if any, if paid now in cash, do you find from a preponderance of the evidence, would be a fair and reasonable compensation to the plaintiff, J. D. Shelton, for the personal injuries, if any, proximately sustained by him on the occasion in question in this case?

Answer in dollars and cents, if any.

Answer $_____.

In connection with this question you are charged that if you find from a preponderance of the evidence that the plaintiff, J. D. Shelton, as a result of such injuries, if any, has been up to this time prevented from laboring and earning money, you may take that into consideration in finding the damages, if any; and if you further find from a preponderance of the evidence that as a result of said personal injuries so caused, if any, plaintiff, J. D. Shelton, has suffered physical pain, you may take that into consideration

in answering this question; and if you further find from a preponderance of the evidence that plaintiff J. D. Shelton has not recovered from his injuries, so caused, if any, and that his ability to work and labor in the future has been impaired, you may take that into consideration in answering this question; and if you further find from a preponderance of the evidence as a result of plaintiff J. D. Shelton's injuries, so caused, if any, it was reasonably necessary for him to have hospital services and the services of a physician, you may also take into consideration the fair and reasonable cost of such hospital and medical services, so reasonably necessary; and if you further find from a preponderance of the evidence that plaintiff, J. D. Shelton, will reasonably and probably suffer physical pain in the future as the result of his injuries so sustained, if any, you may take that into consideration in answering this question. In answering this question you may take into consideration only the elements of damages, if any, set out above.

Covered

W. R. Wallace
Judge

574] Instruction No. ___

What sum, if any, do you find from a preponderance of the evidence if paid now in cash, will fairly and reasonably compensate the plaintiff, Robert Shelton, for injuries, if any proximately resulting to him on account of the collision in question?

Answer in dollars and cents, if any.

Answer $_____.

To aid you in answering the preceding question, you are instructed that you may take into consideration the following elements of damages and none others: (a) the physical and mental suffering which Robert Shelton has reasonably undergone in the past and will reasonably undergo in the future as a direct and proximate result of the injuries, if any, received by him as a result of said collision; (b) the pecuniary loss, if any, which plaintiff Robert Shelton will in reasonable probability suffer after reaching

the age of twenty-one (21) years, as a result of the injuries received by him, if any, as a direct and proximate result of the collision in question; and (c) the reasonable and necessary costs of hospital services and the services of a physician from and after the date of the accident.

Covered

W. R. Wallace
Judge

575] Instruction No. ___

What sum, if any, do you find from a preponderance of the evidence if paid now in cash, will fairly and reasonably compensate the plaintiff, Anita Shelton, for injuries, if any, proximately resulting to her on account of the collision in question?

Answer in dollars and cents, if any.

Answer $_____.

To aid you in answering the preceding question, you are instructed that you may take into consideration the following elements of damages and none others: (a) the physical and mental suffering which Anita Shelton has reasonably undergone in the past and will reasonably undergo in the future as a direct and proximate result of the injuries, if any, received by her as a result of said collision; (b) the pecuniary loss, if any, which plaintiff Anita Shelton will in reasonable probability suffer after reaching the age of twenty-one (21) years, as a result of the injuries received by her, if any, as a direct and proximate result of the collision in question; and (c) the reasonable and necessary costs of hospital services and the services of a physician from and after the date of the accident.

Covered

W. R. Wallace
Judge

576] Instruction No. ___

What sum, if any, do you find from a preponderance of the evidence if paid now in cash, will fairly and reasonably compensate the plaintiff, Larry Shelton, for injuries,

if any, proximately resulting to him on account of the collision in question?

Answer in dollars and cents, if any.

Answer $_____.

To aid you in answering the preceding question, you are instructed that you may take into consideration the following elements of damages and none others: (a) the physical and mental suffering which Larry Shelton has reasonably undergone in the past and will reasonably undergo in the future as a direct and proximate result of the injuries, if any, received by him as a result of said collision; (b) the pecuniary loss, if any, which plaintiff, Larry Shelton, will in reasonable probability suffer after reaching the age of twenty-one (21) years, as a result of the injuries received by him, if any, as a direct and proximate result of the collision in question; and (c) the reasonable and necessary costs of hospital services and the services of a physician from and after the date of the accident.

Covered

W. R. Wallace
Judge

577] Instruction No. ___

What sum, if any, do you find from a preponderance of the evidence if paid now in cash, will fairly and reasonable compensate the plaintiff, Pamela Shelton, for injuries, if any, proximately resulting to her on account of the collision in question?

Answer in dollars and cents, if any.

Answer $_____.

To aid you in answering the preceding question, you are instructed that you may take into consideration the following elements of damages and none others: (a) the physical and mental suffering which Pamela Shelton has reasonably undergone in the past and will reasonably undergo in the future as a direct and proximate result of the injuries, if any, received by her as a result of said collision;

(b) the pecuniary loss, if any, which plaintiff, Pamela Shelton will in reasonable probability suffer after reaching the age of twenty-one (21) years, as a result of the injuries received by her, if any, as a direct and proximate result of the collision in question; and (c) the reasonable and necessary costs of hospital services and the services of a physician from and after the date of the accident.

Covered

W. R. Wallace
Judge

Filed Sept. 12, 1956.

578] Defendant's Requested Instructions

Comes now the above named defendant and most respectfully requests the Court to give to the jury the following instructions:

1. Ladies and gentlemen of the jury you are instructed that the term negligence as used throughout these instructions means the doing of some act which a reasonably prudent person under the same or similar circumstances would not do or the failure to do some act which a reasonably prudent person would do under the same or similar circumstances.

Given: In substance
W. R. Wallace
District Judge

2. You are instructed further that in the operation of an automobile upon the highways of the State of Oklahoma, all persons are required to operate the same in a reasonable and prudent manner having due regard for the traffic upon the highway, the condition of the highway, and that while the speed of an automobile, commonly referred to as a "speed limit", is fixed by Statute, nevertheless if at a given point or place on the highway on account of the
579] traffic or the use made of the highway such maximum speed would be unreasonable, such person or any person is not authorized to drive at such maximum speed, and you are to determine what would be and what is a reasonable speed considering all of the facts and all of the circum-

stances at any given point or any given time or any given place, and all persons are required to operate their vehicles under the circumstances at a reasonable speed, and in any event not to exceed the speed fixed by Statute at such point.

Given: In substance
W. R. Wallace
District Judge

3. If a highway at a given point is congested in traffic or used as a business district or used for the purpose of crossing or re-crossing, then the speed should be commensurate therewith, and a car should not be driven at such a speed as would endanger the lives of the occupants of the car or other cars or pedestrians using said highway in the manner reasonably anticipated or which should be reasonably anticipated by all of the facts and circumstances surrounding and attending said highway at such place and at such time.

Refused: W. R. Wallace
District Judge

4. You are further instructed ladies and gentlemen of the jury, that no one has exclusive use of the highway. The public highways of this State are for the use and benefit of all those desiring to use said highways and all are required to use them in a reasonable and prudent manner
580] considering all the facts and circumstances shown, and a failure to operate an automobile in a reasonable and prudent manner is negligence under the laws of this State.

Given: In substance
W. R. Wallace
District Judge

5. You are further instructed ladies and gentlemen of the jury, that any person driving an automobile on the highways of this State is required under the law to drive said automobile in such a manner that he or she can stop said automobile within the assured clear distance ahead and you are instructed that it is negligence to operate an

automobile in such a manner or at such a speed that the same cannot be stopped by the operator thereof within the assured clear distance ahead, and if you find that the plaintiff herein failed to operate his automobile so that he could stop the same within the assured clear distance ahead and that such negligence upon his part either brought about the accident or contributed thereto, then and in that event the plaintiff cannot recover herein and your verdict must be for the defendant.

Given: In substance
W. R. Wallace
District Judge

581] 6. By the term assured clear distance ahead, you are instructed that this term means that a person must operate an automobile on the public highway so that he can stop his car within the unobstructed range of his vision and if there are obstructions upon the highway he must operate his car so that he can stop the same before coming in contact with such obstruction whether it be an automobile or a pedestrian. Assured clear distance simply means the distance which is assured without any obstruction thereon, and if an obstruction is upon the highway then the driver of an automobile must have his car under such control that he can stop it before colliding with such object.

Given: In substance
W. R. Wallace
District Judge

7. You are further instructed ladies and gentlemen of the jury, that a person driving upon the highway and approaching a hill over which he or she cannot see, must keep such car under control so that he or she can stop the same within the range of his vision and he or she does not have the right to assume that the highway will be clear beyond his or her vision.

Refused: W. R. Wallace
District Judge

582] 8. You are therefore instructed that if you find that in this case the plaintiff was approaching the

crest of the hill coming from the south and traveling north and that he could not see over said hill when approaching the same, then he was required to approach the same in such a manner that he could stop his automobile when he arrived at the top of such hill or at a point on said hill where he could see beyond said hill and determine whether or not there was traffic on said highway or approaching said highway and be able to stop the same without injury to any person or persons or vehicles that might be on said highway or crossing the same.

Refused: W. R. Wallace
District Judge

9. Ladies and gentlemen, you are further instructed that it was the duty of the plaintiff in this case to take into consideration in driving his automobile the nature of the surroundings on said highway at the point where the accident complained of occurred. That is, he should take into consideration whether or not there were buildings, whether or not there were businesses operated on said highway and whether or not people would likely be crossing said highway from either the east or the west or turning off of said highway, and he should take into consideration the nature of the highway, whether it was maintained to permit traffic to cross and re-cross, and drive his car taking all of these matters into consideration in a reasonable and prudent manner and anticipate the ordinary and reasonable use of said highway in said regard and whether people would or would not be crossing said highway and whether or not there would likely be traffic thereon considering the use thereof made and the surroundings at such place.

583] Refused: W. R. Wallace
District Judge

10. You are further instructed that it was the duty of the plaintiff in this case to have his car properly equipped with brakes so that he could stop the same within a reasonable distance considering the size and the weight of the car and the condition of the road.

Refused: W. R. Wallace
District Judge

11. You are instructed, ladies and gentlemen of the jury, that the law requiring meeting vehicles to turn to the right does not apply to vehicles crossing from one side of the road to another, and one desiring to stop at premises on the left side of the road may cross over to that side without violating the law. In such cases the driver who desires to cross over must like all other drivers use due care; that is he or she must exercise reasonable care and caution in crossing the highway, but nevertheless, any person has the right to cross any highway provided he or she uses due care in so doing. In determining whether any person is guilty of negligence in crossing a highway or driving a car upon the highway you should use as your guide in determining such matter whether or not an ordinary, reasonable prudent person under the same or similar circumstances would so drive his car across the highway or would drive his or her car in the manner which you find from the evi-
584] dence either of the parties drove their cars at the time and place in question.

Given: In substance
W. R. Wallace
District Judge

12. You are instructed that the duty to drive an automobile on the highways imposed on the plaintiff and defendant mutual and reciprocal obligations and that both were required to operate their cars as a reasonable and prudent person would operate the same under the same or similar circumstances.

Given: In substance
W. R. Wallace
District Judge

13. You are further instructed in this case ladies and gentlemen, that if you find that the plaintiff was guilty of negligence in any manner in the operation of his car and that such negligence contributed to the accident and injuries complained of, then your verdict must be for the defendant although you may find that the defendant was likewise guilty of negligence which contributed to the accident or injuries complained of. In other words, you are instructed that if both parties were guilty of negligence

and the combined negligence of both parties brought about the accident, then neither of said parties are entitled to recover from the other and your verdict must simply
585] read: "We, the jury, find for the defendant". which simply means that neither party can recover from the other.

Given: Covered
W. R. Wallace
District Judge

14. You are further instructed ladies and gentlemen of the jury, that in this case if you should find that the accident and injuries complained of were brought about without fault of either party, then the same would be called and termed an unavoidable accident and neither party would be entitled to recover and your verdict must be: "We, the jury, find for the defendant."

Given: W. R. Wallace
District Judge

15. Ladies and gentlemen of the jury, you are further instructed in this case that the evidence shows and it is admitted that the plaintiff J. D. Shelton and his wife Venera Shelton owned the automobile in which they were riding jointly and that said plaintiff husband and wife were on a joint mission for their own pleasure and benefit and for that of their family and therefore, the negligence of one was imputable to the other, and both had a duty to either drive said car in a reasonable and prudent manner and keep a proper lookout on the highway for their own safety and the safety of others, and that a failure upon the part of the plaintiff J. D. Shelton to so operate said car
586] in a prudent manner was imputable to his wife Venera Shelton, and that Venera Shelton had a duty to keep a lookout on said highway and to advise her husband of any approaching danger and to warn him of any attending danger on said highway and if she failed to so do, her negligence in this regard is imputable to the plaintiff J. D. Shelton, and if you find that her acts in failing to keep a proper lookout and warn the plaintiff of any approaching danger contributed to or brought about the accident between plaintiffs' car and defendant's cars, then and in that event you are

instructed that your yerdict should be for the defendant herein.

Refused: W. R. Wallace
District Judge

16. You are instructed that in the use of a highway in the operating of automobiles thereon, a person may cross the highway or turn to the left accross said highway if there is no traffic or automobile in view close enough to constitute an immediate hazard. In other words, a person is not required to wait until the highway is completely cleared in all directions but may cross a highway when there appears to be no car so close as to constitute an immediate hazard, and in this regard you are further instructed that the defendant Mrs. Minnie Franklin had a right to assume that persons driving on said highway would drive their cars at a reasonable rate of speed under the circumstances and would keep their car or his or her car under such control that he or she could stop the same within the assured clear distance ahead.

Given: Covered
W. R. Wallace
District Judge

587] 17. You are further instructed that the defendant Mrs. Minnie Franklin had the right to cross said highway when it appeared to her after looking that there was no vehicle approaching so close as to constitute an immediate hazard, and if she looked and saw no car close enough or in view then she had the right to cross said highway at a reasonable rate of speed.

Given: Covered
W. R. Wallace
District Judge

18. You are further instructed that it was the duty of the plaintiff J. D. Shelton in the operation of the automobile when he observed the automobile of the defendant on the highway to exercise reasonable care and caution to prevent striking her or hitting her car and he should have if he could have reasonably done so under the circumstances,

driven his car either to the right or left or stopped said car in order to avoid said collision, and even if you should find that the defendant Mrs. Minnie Franklin had driven her car out on said highway, nevertheless the plaintiff would not have the right to drive his car into her car regardless of who might have been at fault, but he had a duty to prevent the accident and use reasonable care and caution after he saw her car thereon and to either drive said car to the right or left or apply his brakes with such force as to stop his car if he could have reasonably done so at the time.

Given: Covered
W. R. Wallace
District Judge

588] 19. With reference to the term contributory negligence as used in these instructions, ladies and gentlemen of the jury, you are told that the term contributory negligence simply means negligence on the part of some person or persons which contributes to the accident, and consequently, any person who is guilty of contributory negligence cannot recover.

Given: W. R. Wallace
District Judge

20. Ladies and gentlemen of the jury, you are instructed that evidence has been offered in this case showing or tending to show or for the purpose of showing that on the east side of the highway at or about the point where the collision occurred there were business establishments consisting of cafes, filling stations and other businesses, and that on either side of the paved portion of the highway there was a space leveled and graveled or improved by the Highway Department of the State of Oklahoma for the purpose of affording traffic a place to cross said highway from either the west or the east, and that it was the custom of the public generally to cross said highway from east to west at said point and from west to east, and that it was apparent from one driving on said highway that such use was made of the highway and that such crossing was a common custom or usage, and if you find from the evidence this to be true, then you are instructed that the defendant in this

case, Mrs. Minnie Franklin, had the right to cross said highway provided she used reasonable care and caution in so doing, and that if she exercised the same care and caution in crossing said highway as is or was used by an ordinary, reasonable and prudent person, then you are instructed that after she entered upon said highway and crossing the same if she entered the same before the plain-
589] tiffs' automobile had come into plain view, then and in that event she had the right-of-way and it became the duty of the plaintiff to yield the right-of-way to her.

Refused: W. R. Wallace
District Judge

21. Ladies and gentlemen of the jury, in determining whether Mrs. Franklin, the defendant in this case, was guilty of negligence or contributory negligence, you should determine, considering the conditions existing at the point or place of the accident, whether or not she acted as a reasonably careful and prudent person, and if you find that she did so act as a reasonably prudent person under such circumstances in the crossing of the said highway, you are instructed that she would not be guilty of negligence and that she had a right to so act and your verdict must be for the defendant Mrs. Franklin.

Given: Covered
W. R. Wallace
District Judge

590] 22. You are further instructed that under the laws of this State that if a vehicle enters upon thie highway an appreciable length of time ahead of another vehicle approaching said point where said vehicle is crossing the highway, said vehicle crossing the highway would have the right-of-way since the first vehicle on said highway would have the right-of-way at said point if it entered upon said highway at said point an appreciable length of time ahead of the other automobile approaching said point regardless of what direction the other vehicle was approaching from, and you are instructed that both drivers must exercise reasonable precaution commensurate with the apparent dangers incident to driving upon a highway burdened with traffic to avoid injury to the person or property on such highway

regardless of which vehicle has the right-of-way.

Given: Covered
W. R. Wallace
District Judge

23. You are further instructed that the right of precedence as to the right-of-way does not release the vehicle thus favored from the duty of exercising due care not to injure another and that it was the duty of both plaintiff and defendant to exercise every reasonable precaution commensurate with the apparent danger incident to driving upon a highway where the accident occurred which was burdened with traffi egardless of which of the vehicles had the right-of-way.

Given: Covered
W. R. Wallace
District Judge

591] 24. You are instructed that it is the duty of a driver of an automobile while driving upon a public highway to keep his automobile always under proper control so as to avoid an accident, and to drive the same at a rate of speed which is proper and sufficiently slow in the light of attending circumstances, and you are, therefore, instructed that if you find from a fair preponderance of the evidence that the plaintiff failed to observe any of the above-enumerated duties and obligations of those who drive cars upon the highways, and that this failure so to do was the proximate cause of the accident or contributed thereto, and that the accident proximately produced the injuries, if any, to plaintiff, for which he is now suing, then you are instructed that your verdict should be in favor of the defendant and against the plaintiff.

Given: Covered
W. R. Wallace
District Judge

Filed Sept. 13, 1956.

[Plaintiffs' exhibit 1 is a large drawing on cardboard with reference to the accident area. The original exhibit is on file in the Clerk's office.]

[Plaintiffs' exhibit 2 is the deposition of Dr. Glenn Cherry which appears at page 121.]

[Plaintiffs' exhibit 3 is the cross-examination from the deposition of Dr. P. M. McNeillwhich appears at page 118.]

Plaintiff's Exhibit 5

3 of 3

PRODUCE CO.

[Plaintiffs' exhibits 7 to 10, inclusive, are X-rays.]

[Plaintiffs' exhibit 12 is the direct and redirect examination from the deposition of Dr. George Truett James which deposition appears at page 137.]

Brandon Carrell, M.D.
Dorsey K. Barnes, M.D.

H. H. Beckering, M.D.
George Truett James, M.D.

The W. B. Carrell Clinic

3701 MAPLE AVENUE PHONE LAKESIDE 2191
DALLAS 4, TEXAS

DATE	DESCRIPTION	CHARGES	CREDITS	BALANCE
BALANCE FORWARDED				287.50
Dec 22	XR	5.00		
Dec 22	Cash		5.00	287.50

Dec 22 XR	5.00		
Dec 22 Cash		5.00	287.50

UNITED STATES DIST. COURT
PLAINTIFF'S
EXHIBIT
NO. 11
MUSKOGEE, OKLA.

BI

Shoe Correction
Straps
XR: X-rays

Anesthetic
Operating Room

CR: Credit

Plaster Cast
Queen Ann Collar

PT:
Physical Therapy
CS: Cash

Brandon Carrell, M.D.
Dorsey K. Barnes, M.D.

Plaintiffs' Exhibit 11

H. H. Beckering, M.D.
George Truett James, M.D.

The W. B. Carrell Clinic

3701 MAPLE AVENUE PHONE LAKESIDE 2191
DALLAS 4, TEXAS

P-5
W.T.S. 1

Mr. John D. Shelton
920 Gilmer St.
Sulphur Springs, Texas

DATE	DESCRIPTION	CHARGES	CREDITS	BALANCE
BALANCE FORWARDED				
Aug 1 55	XR	10.00		
Aug 1	PL	6.00		16.00
Aug 1	CASH		16.00	-0-
Aug 18	Cash		75.00	75.00

Aug 1	PL	6.00		16.00
Aug 1	CASH		16.00	-0-
Aug 18	Cash		75.00	75.00
Aug 22	XR	10.00		
Aug 22	DR	2.50		62.50
Aug 22	Cash		12.50	75.00
Sept 12	PS	150.00		
Sept 12	XR	15.00		
Sept 12	Cash		15.00	75.00
Oct 3	XR	5.00		
Oct 3	Cash		5.00	75.00
Oct 6	PS	250.00		325.00
Oct 24	XR	10.00		
Oct 24	Cash		10.00	325.00
Nov 5	Cash		37.50	287.50

BR: (BRACE DEPT.)
Brace
Brace Repair
Chest Belt
Clavicle Strap
Shoe Correction
Straps
XR: X-rays

IJ:
Injection

LB:
Laboratory Tests

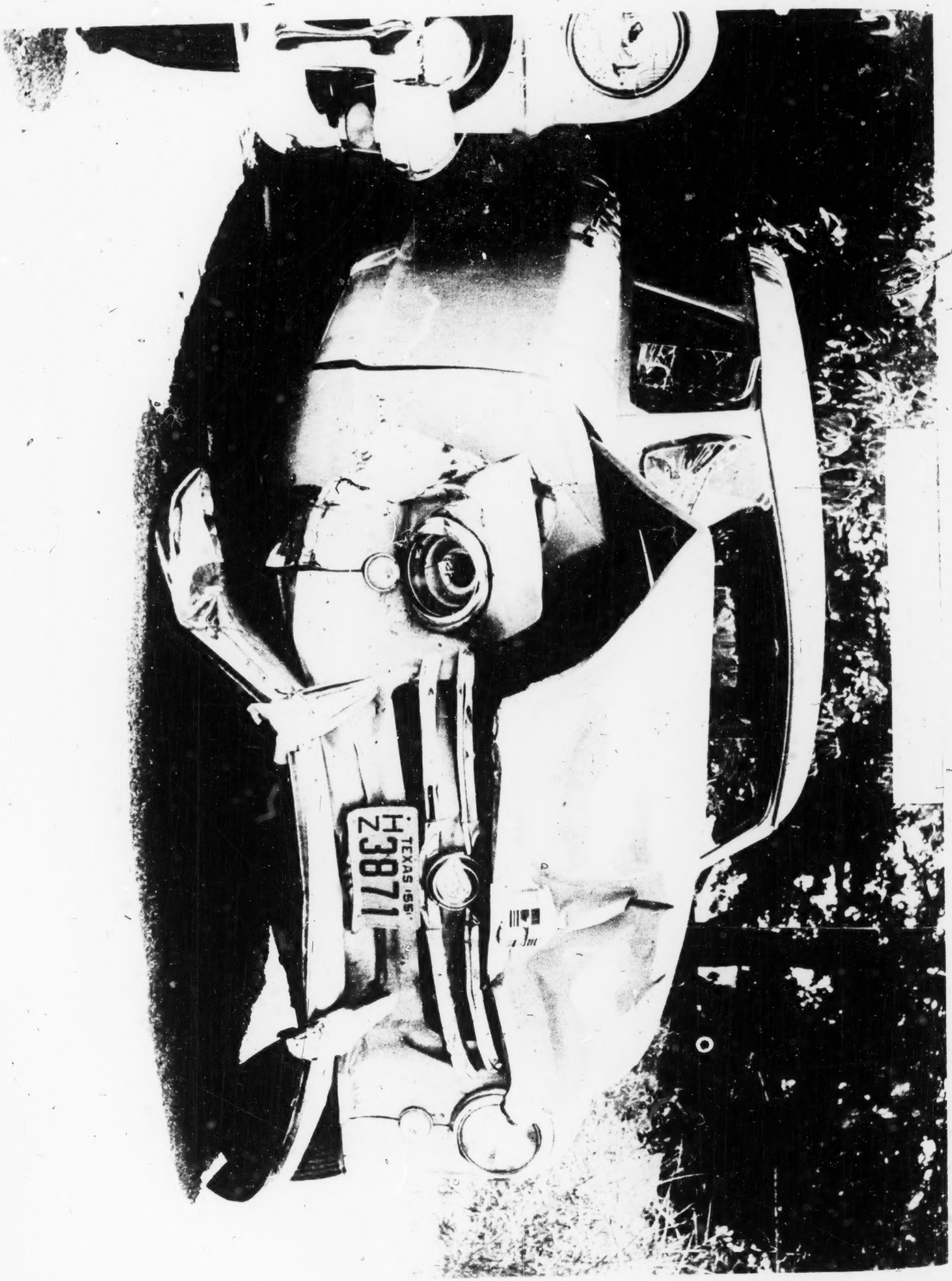
OR:
Anesthetic
Operating Room

CR: Credit

PL: (PLASTER ROOM)
Anklet
Dressing
Drugs
Head Halter
Plaster Cast
Queen Ann Collar

PS: (DOCTOR'S CHARGE)
Examination
Fracture
Observation
Surgery

PT:
Physical Therap
CS: Cash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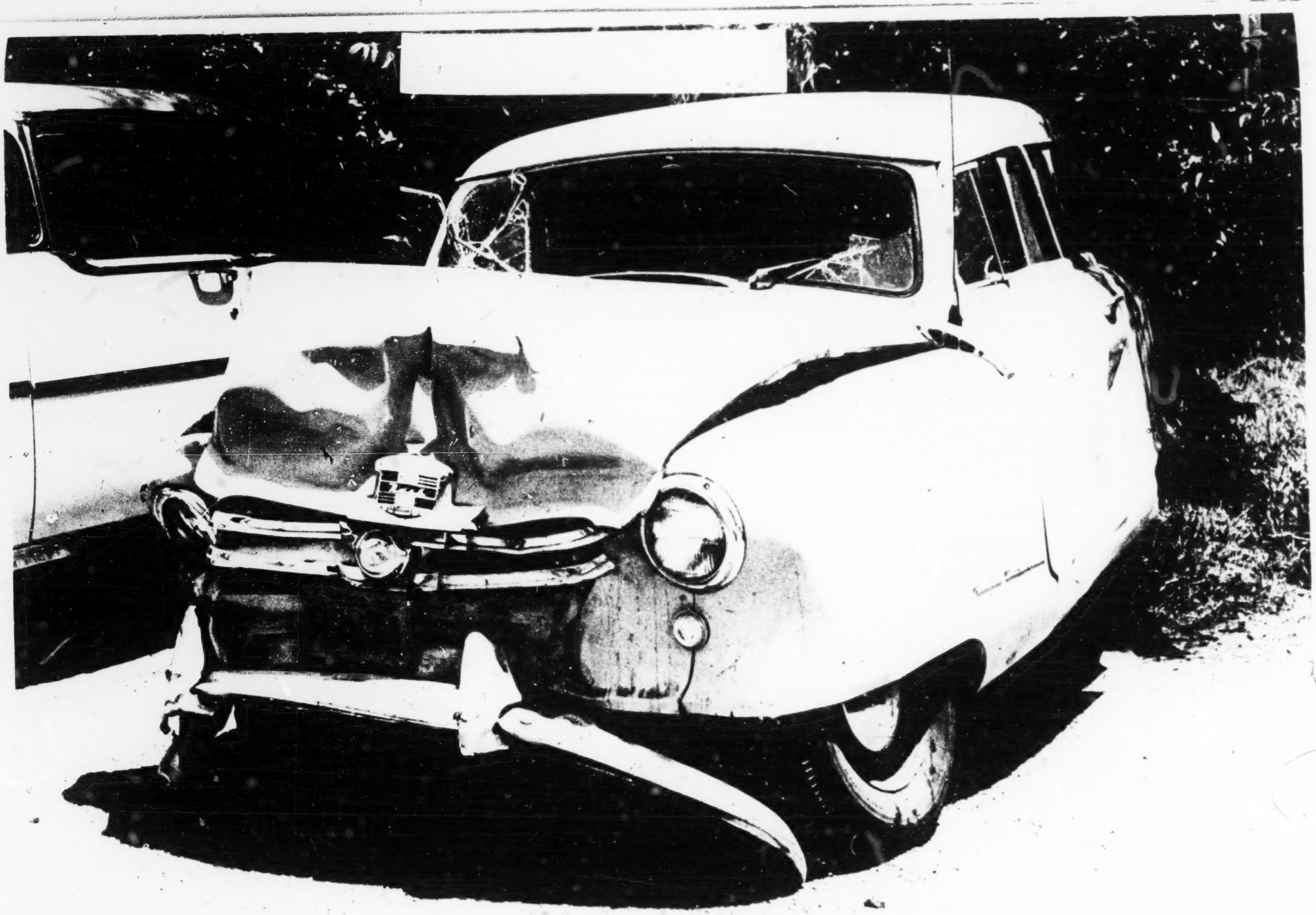

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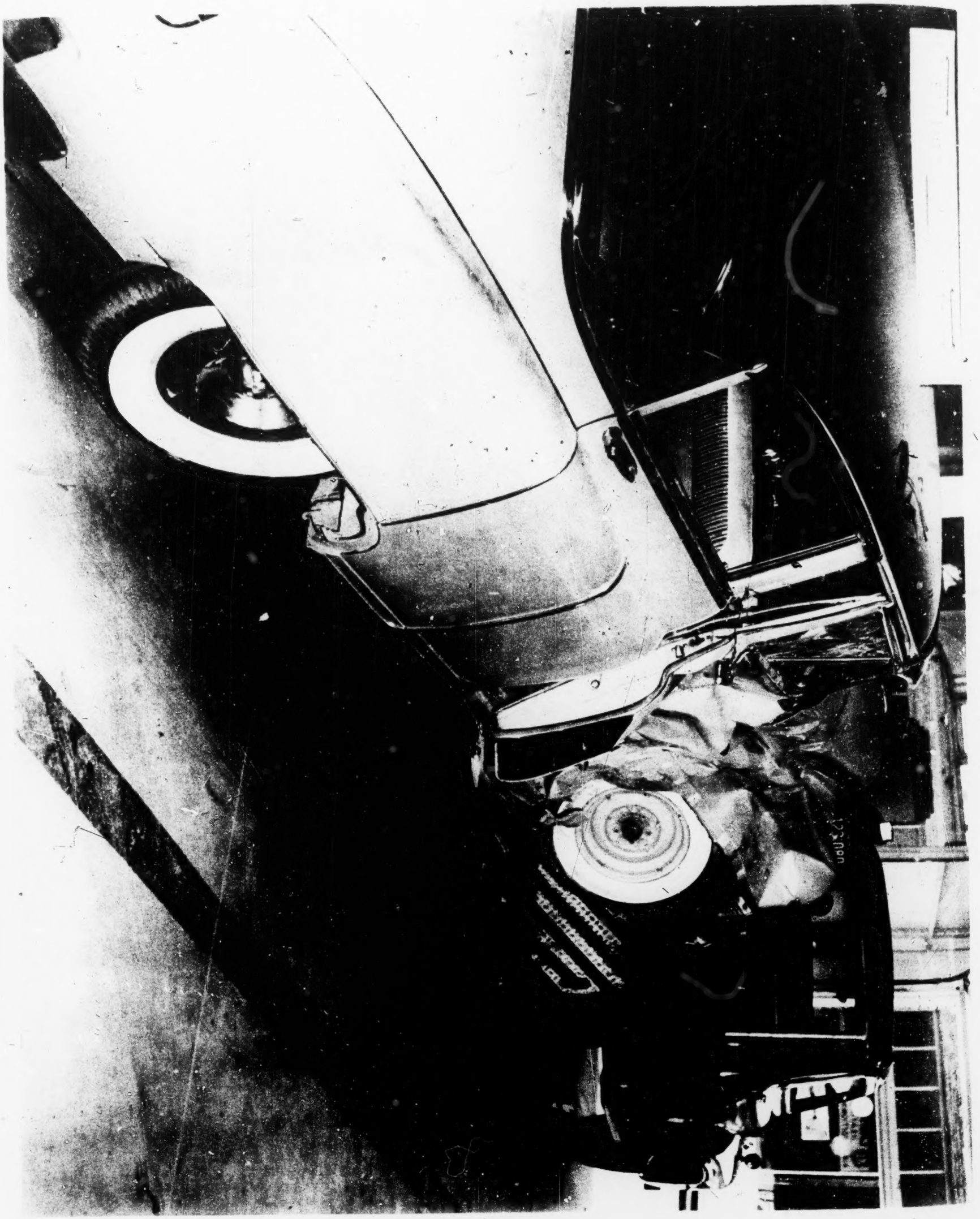


Plaintiffs' Exhibit 16

606] Plaintiffs' Exhibit 17.

Shelton vs. Franklin

Dallas, Texas
2-29-1956

It is stipulated by the parties that the following bills may be proved by the parties without the necessity of producing the witness who performed the services and admit that the person or persons who performed the services would testify if present that the same were reasonable and necessary:

(J.D.Shelton)	Dr. T. H. Stevens	$ 62.50
(J.D.SHelton)	W. B. Carrel Clinic	463.--
(J.D.SHELTON)	Baylor University	
Family	Hospital	348.10
	Medical Arts Clinic	103.00
	George A. Brewer	
	Ambulance Service	20.00
	Bettes Funeral Home	88.50

/s/ HSS and JBO

(second page)

Dr. Stevens (Mrs.)	27.00
" " (Larry)	27.00
Baylor Hospital (Mrs)	77.20
Surratt (Mrs. Shelton)	12.50
Milton Davis (Mrs)	25.00
Dr. Cherry (Mrs)	50.00
Dr. Stevens (Robert)	27.00
Mrs. Buggs (Robert)	9.50
Dr. Davis (Robert)	350.00
Baylor U (Robert)	125.50
Surrat (Robert)	10.00
Hopkins Co. (Robert)	17.95
Dr. Cherry (Larry)	500.00
Baylor U (Larry)	148.05
Baylor U. (children)	5.00
Hopkins Co. (Larry)	13.95
Dr. Stevens (Larry)	27.00
Baylor U. (Larry)	5.00
Hazel McConnell (family)	20.00
Nurses (Theland & Scruggs)	22.50
Nelson Drug Store	125.00

Franklin v. Shelton et al.

/s/ John B. Ogden,
Attorney for Defendant

initialed JBO
" HSS

/s/ Howard S. Smith
Attorney for Plaintiff

[Attached to plaintiffs' exhibit 17 is an adding machine tape which appears to show the total of the figures, just above, as $2,710.15.]

[Plaintiffs' exhibit 18 is composed of a portion of the deposition of P. M. Fonville which deposition appears at page 306.]

[Defendant's exhibits 1 to 3, inclusive, are X-rays.]

[Defendant's exhibit 4 is a large plat of the plan and profile of a portion of State Highway No. 77. The original exhibit is on file in the Clerk's office.]

[Defendant's exhibit 5 is the original drawing of defendant's exhibit 4. The original exhibit is on file in the Clerk's office.]

[Defendant's exhibit 6 is the direct and redirect examination of Dr. P. M. McNeill which deposition appears at page 290.]

[Defendant's exhibit 7 is composed of the depositions of Dr. Ray B. Graybill and P. M. Fonville which appear at pages 299 and 306.]

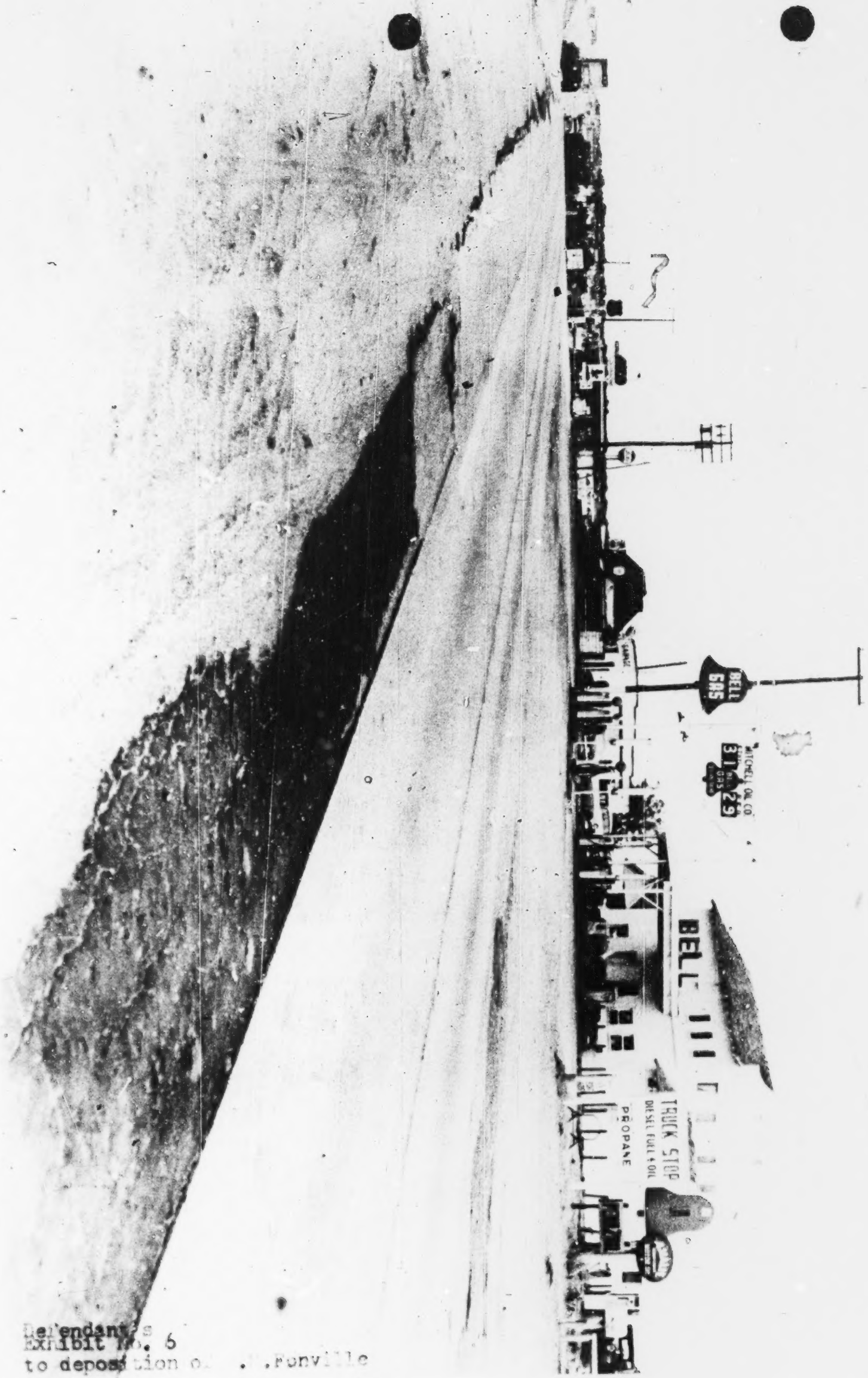
---

efendant's Exhibit A-2
eposition of ... Smith

409

Defendant's Exhibit No. 4
to Deposition of F. F. Fonville

Defendant's Exhibit No. 5
to deposition of P. M. Fonville.



Defendant's
Exhibit No. 6
to deposition of . .Fonville

efendant's Exhibit No. 7
to deposition of ...Fonville

Defendant's Exhibit No. 8
to deposition of P.H. Granville

(Page 423) (Page 422 is blank)

Defendant's Exhibit No. 9
to deposition of [illegible]

Franklin v. Shelton et al.

624] Defendant's Exhibit 8.

August 31, 1956

Mr. Howard S. Smith, Attorney at Law, Pulley Building, Sulphur Springs, Texas

Re: Shelton, et al v. Franklin.

Dear Sir: I am enclosing herewith Amendment in accordance with my telephone conversation with you on yesterday.

It is my contention that under the laws of the state of Texas what Mr. and Mrs. Shelton acquired in the way of property and/or money became the community property of both of them and that they were using community property and joint funds, on a joint mission and operating a jointly owned car on a joint mission for the benefit of themselves and their children and therefore, the acts of one binds the other and each owed a duty to the other as an agent in the operation and handling of said automobile, and under the law of Oklahoma where they were operating the car if they owned it jointly and were on a joint mission, they were agents one for the other and each owed a duty to observe the road, assist in the direction, guidance and handling of said automobile.

I will ask Judge Wallace to permit me to file this Amendment at trial time and I am sending it to you now so you will not be surprised when the same is handed to the Judge for filing. Judge Wallace, I believe, is presently in Dallas attending the American Bar Association meeting according to newspaper reports, and probably will not be available for the purpose of presenting this Application to him for filing until we meet at Muskogee for trial. I am sure that you could not have any objection to my pleading the laws of Texas which I think I have heretofore clearly done, but I am doing this as a matter of precaution so that you will know my theories and reason for filing this Amendment. I thought we had agreed on this at the pre-trial.

Franklin v. Shelton et al.

With kindest personal regards, I am

Yours very truly,
John B. Ogden

JBO:ms
Encl:1
cc: R. M. Mountcastle
R. A. Howard

625] In the United States District Court for the Eastern District of Oklahoma. J. D. Shelton et al., Plaintiffs, v. Minnie Franklin, Defendant. No. 3980

Supplement to Answer and Cross-Complaint

Comes now the defendant, Mrs. Minnie Franklin, and shows to this Honorable Court that she hereby amends her answer and cross-complaint after first obtaining leave of this Court, and in connection therewith shows that the plaintiffs herein are residents of Sulphur Springs, Texas and were at all times mentioned herein, and by virtue thereof were governed with reference to the acquisition of property and funds by the laws of the state of Texas, which acquisition of funds occurred within the state of Texas.

This defendant now shows to this Honorable Court that under the laws of the state of Texas, commonly referred to as Vernon's Civil Statutes of the State of Texas Annotated, Revision of 1925, Volume 13, Articles 4076 to 4641, define the statutory rights of the husband and wife and fix their rights under the community property laws of the state of Texas, and that by virtue of the laws of the state of Texas the automobile referred to in plaintiffs' complaint was the joint property of the plaintiff J. D. Shelton and his wife Venera Shelton, and that the funds used by said parties were used by them as their joint funds and said parties were on a joint mission, furnishing equally the transportation and expenses of said trip and for the use and benefit of both of said parties and their children, and that said parties in addition thereto had both contributed equally to the ownership of the automobile and the expenses of said trip, and by virtue thereof said parties became agents for each other in said joint venture and acting for and on behalf of each

other and for the use and benefit of each other, and that both owed a common duty to assist and aid in the op-
626] eration, management and control of said car upon the public highway of the state of Texas and the state of Oklahoma, and that each become liable for the acts of the other in the joint mission upon which they were engaged, and that the said wife owed a duty to observe the traffic on the highway and advise her husband of any objects or traffic thereon and to advise him with reference to the speed and manner of driving said automobile. This defendant shows that said Statute, Article 4614 is in words and figures as follows to-wit:

"All property of the wife, both real and personal, owned or claimed by her before marriage, and that acquired afterward by gift, devise, or descent, as also the increase of all lands thus acquired, shall be the separate property of the wife. The wife shall have the sole management, control, and disposition of her separate property, both real and personal; provided however, the joinder of the husband in the manner now provided by law for conveyances of the separate real estate of the wife shall be necessary to the incumbrance or conveyance by the wife of her lands, and the joint signature of the husband and wife shall be necessary to a transfer of stocks and bonds belonging to her or of which she may be given control by this law. Const. art. 16, Sec. 15; Acts 1848, p. 77; G.L. vol. 3, p. 77; Acts 1913, p. 61; Acts 1917, p. 436; Acts 1921, p. 251; Acts 1929, 41st Leg., p. 66, ch. 32, Sec. 1."

This defendant further shows that she has heretofore plead in her answer certain portions of Section 4613 and 4619 of said Statutes above referred to and hereby pleads Articles 4076-4641, being Volume 15 of Vernon's Annotated Revised Civil Statutes of the State of Texas, Revision of 1925, which said Volume and said Sections set forth the rights, duties and liabilities of the husband and wife under the community property laws of the state of Texas, and said sections are hereby made a part of this amendment by reference as if fully set out in words and figures herein.

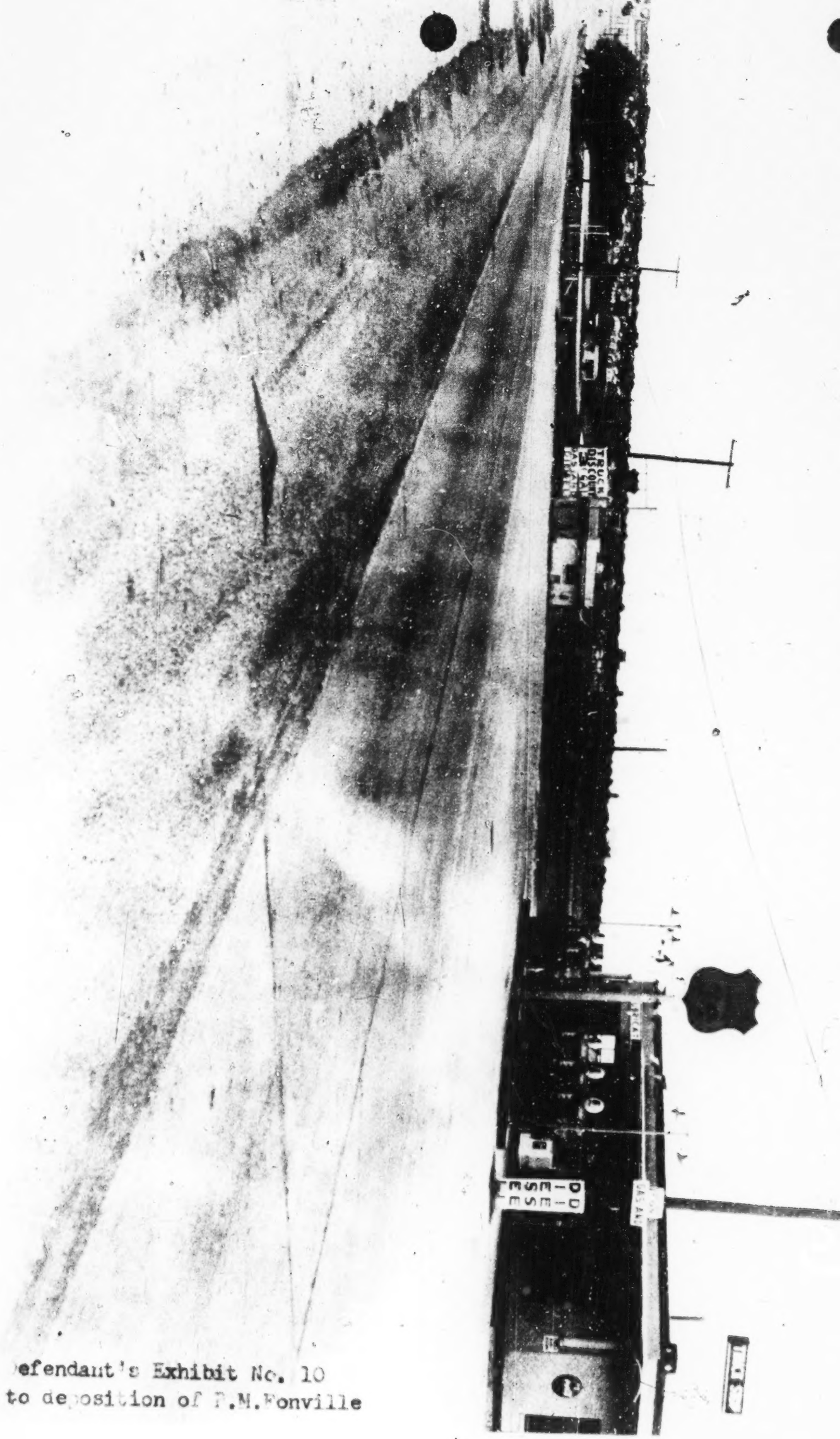
Wherefore, this defendant prays for judgment as in her answer and cross-complaint set out, and hereby amends

and adds to said original answ and cross-complaint the additions hereinabove made.

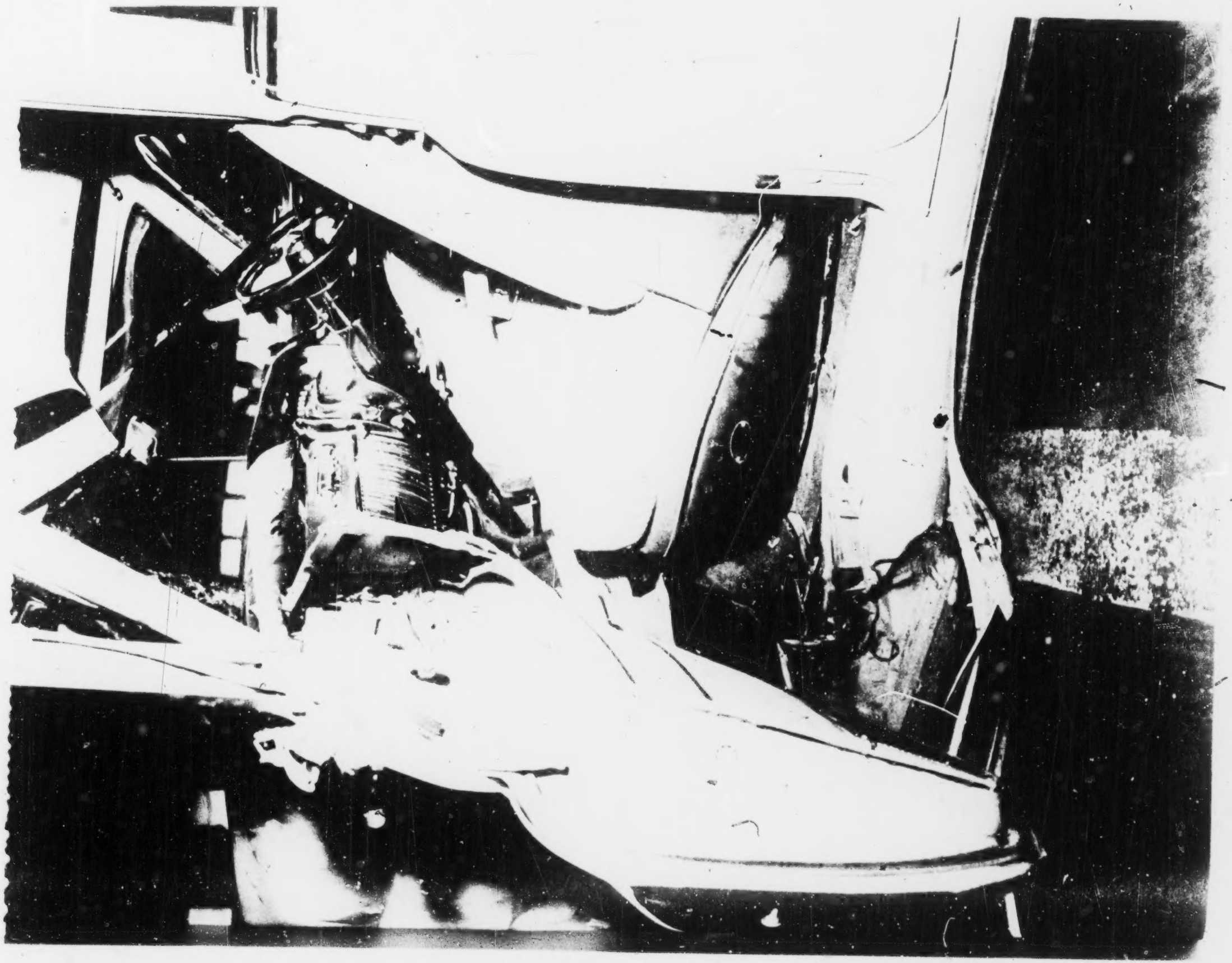
R. A. Howard
Ardmore, Oklahoma
and
John B. Ogden
1408-9 Liberty Bank Building
Oklahoma City, Oklahoma
Attorneys for Defendant
By John B. Ogden

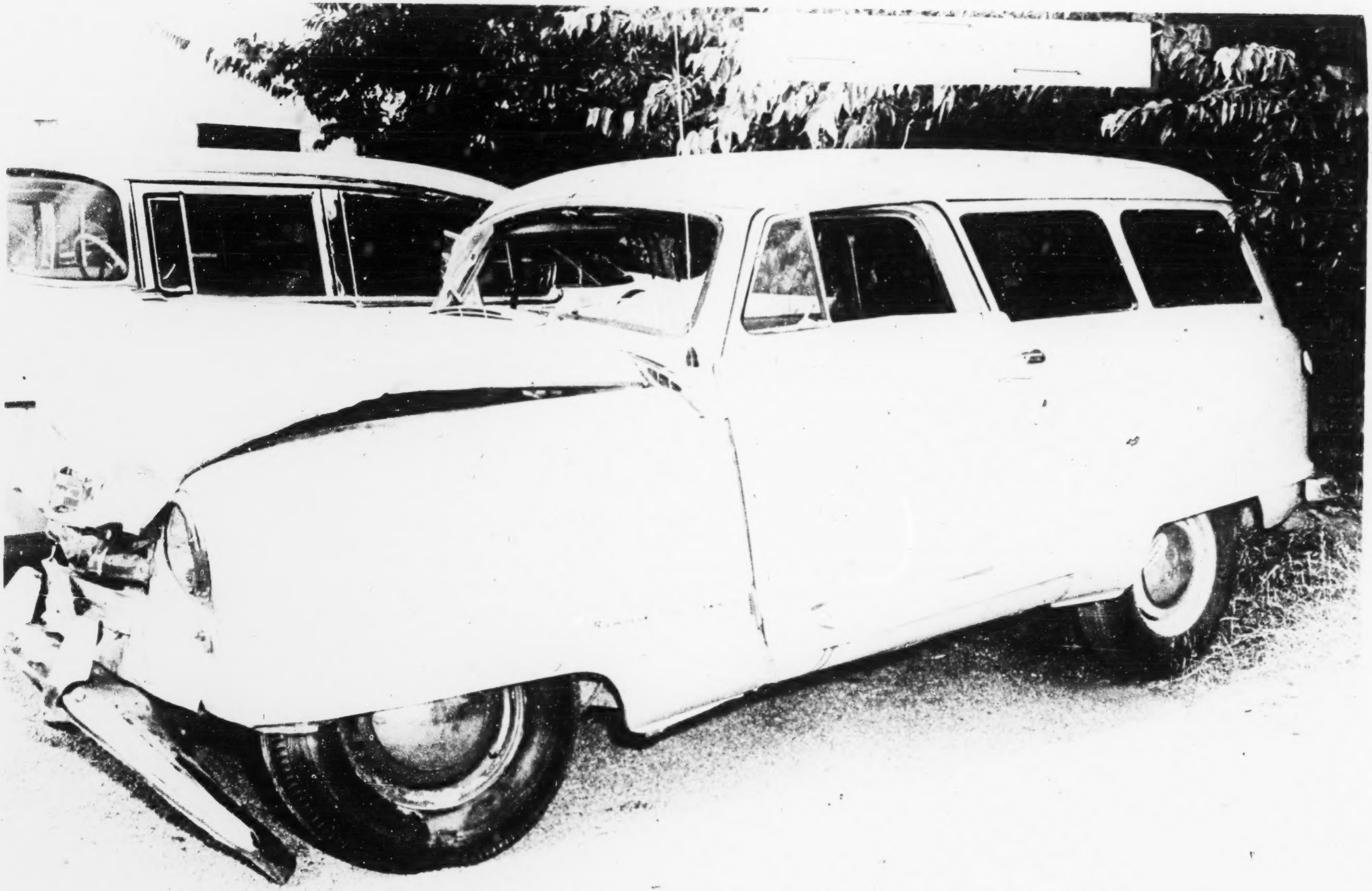
627] I certify that I mailed a true and correct copy of this Supplement to Answer and Cross-Complaint to Howard S. Smith, Pulley Building, Sulphur Springs, Texas and to R. M. Mountcastle, Barnes Building, Muskogee, Oklahoma, attorneys for plaintiffs, on this the 31st day of August, 1956.

John B. Ogden



efendant's Exhibit No. 10
to deposition of F.M.Fonville





Defendant's Exhibit 32

[illegible]

Franklin v. Shelton et al.

632] Certificate of Clerk

United States of America, Eastern District of Oklahoma
SS

I, John H. Pugh, Clerk of the United States District Court in and for the Eastern District of Oklahoma do hereby certify that the annexed and foregoing are the true original pleadings and proceedings in 3980 Civil; J. D. Shelton, et al. vs. Minnie Franklin, as is called for in the designation of the contents of the record on appeal filed herein.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid court at Muskogee, Oklahoma, this 27th day of February 1957.

John H. Pugh
Clerk, U. S. District Court
By: Randolph Kizzire
Deputy Clerk.

(Seal)

Filed United States Court of Appeals Tenth Circuit, March 13, 1957, Robert B. Cartwright, Clerk.

JOHN T. FEY, Clerk

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 342

MINNIE FRANKLIN,
Petitioner,

VERSUS

J. D. SHELTON and Wife, VENERA SHELTON, suing herein in their own behalf; and PAMELA SHELTON, LARRY SHELTON, ANITA SHELTON, and ROBERT SHELTON, minors, suing herein by and through J. D. SHELTON, as their next friend,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JOHN B. OGDEN,
1408-9 Liberty Bank Building,
Oklahoma City, Oklahoma.

JOSH LEE,
1405 Liberty Bank Building,
Oklahoma City, Oklahoma.

R. A. HOWARD,
Little Building,
Ardmore, Oklahoma,

Attorneys for Petitioner.

January, 1958

UTTERBACK TYPESETTING CO. 13 SO. WALKER OKLAHOMA CITY PH. FO 5-8750

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In the
Supreme Court of the United States
OCTOBER TERM, 1957

No. .....

MINNIE FRANKLIN,
Petitioner,

VERSUS

J. D. SHELTON and Wife, VENERA SHELTON, suing herein in their own behalf; and PAMELA SHELTON, LARRY SHELTON, ANITA SHELTON, and ROBERT SHELTON, minors, suing herein by and through J. D. SHELTON, as their next friend,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Minnie Franklin, prays that a Writ of Certiorari issue to review the decision and judgment of the United States Court of Appeals for the Tenth Circuit entered below on November 7, 1957.

THE OPINION BELOW

The opinion below is hereto attached as Appendix "A."

JURISDICTION

The decision and judgment of the Court of Appeals was entered on November 7, 1957. A timely Petition for Rehearing (R.) was denied by the court below on December 16, 1957 (R.). The mandate of the court below has been stayed until January 20, 1958. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

This case is of particular importance we think in view of the fact that it presents several questions which were such a departure from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision. The facts are related as to the nature of the case in the opinion set forth and we deem it unnecessary to repeat them here.

QUESTIONS PRESENTED

1. There is direct conflict between the decisions of the Court of Appeals upon questions of Federal Rules of Civil Procedure, being Rules 51 and 46.

2. Conflict of decisions of Court of Appeals in opinion with state court decisions of the Supreme Court of Oklahoma on nonfederal questions in violation of the Rule and the law as announced by the Supreme Court of the United States in *Erie R. R.* v. *Tompkins*, 304 U.S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1183.

3. The judgment of the District Court for the Eastern District of Oklahoma and the opinion of the Circuit

Court of Appeals above quoted in this case denies to the petitioner her constitutional rights and is violative of Amendment V of the Constitution of the United States in that it denies her due process of law.

4. The trial court and the Court of Appeals denied the petitioner her constitutional rights guaranteeing her a fair and impartial trial on the ground of harmless error.

The facts as reflected by the record in this case are simply that the trial court refused, as we view it, to properly instruct the jury which we think is a fundamental error. The trial court refused to give to the jury proper requested instructions which were requested by the petitioner in writing and refused by the trial judge in writing. The trial judge refused to present to the jury the theory of defense of this petitioner. The trial judge by his instructions to the jury told the jury that the plaintiff, J. D. Shelton (in the trial court) had certain rights upon the highway with reference to assumption and refused to give the same instruction for the defendant (petitioner). The trial court refused to require plaintiffs' attorneys in the trial court (respondents here), to make a full opening argument after proper request and proper objections in the trial court taking an undue advantage of this petitioner and her counsel.

Also, this case presents the question to this Court of the conduct of the parties to litigation in the trial court in view of the fact that the principal plaintiff, J. D. Shelton, while on the witness stand, without cause or provocation, began weeping and crying loudly, we think for the purpose of exciting the jury and incurring their sympathy, and at the same time his wife, Venera Shelton, another plaintiff

in the trial court, stood up at the counsel table and began weeping and crying and thereby caused great confusion and sympathy of the jury, and the petitioner thereupon demanded and requested a mistrial which was refused by the trial court, and the Court of Appeals in its opinion held that this was in the discretion of the trial court, both as to the manner of arguing the case and as to the conduct of the parties in open court in the presence of the jury.

Petitioner therefore shows to this Court that this petition does present to this Court a very unusual trial, completely beyond the pale of accepted and usual course of judicial proceedings, and that she has been denied due process of law under the Constitution of the United States.

STATEMENT

A statement of the facts we deem unnecessary other than to say this case involves an accident between the petitioner and respondent J. D. Shelton, and the record shows very briefly, that the petitioner had driven her car south for the purpose of going to a business district on the east side of the road, had driven her car off the highway, headed or pointed to the east and there waited until all traffic had cleared, and when there was no traffic close enough to constitute an immediate hazard she drove her car to the business district on the east side of the highway and most of her car was off the paved portion of the highway when the respondent J. D. Shelton drove his car over the crest of the hill and into the side of the car of the petitioner bringing about injury to himself and to the petitioner and some other members of the family.

Question Presented Number One

There is direct conflict between the decisions of the Court of Appeals upon questions of Federal Rules of Civil Procedure, being Rules 51 and 46.

In presenting our first proposition that the Court of Appeals in its opinion committed grave error in refusing or in failing to consider Rule 46 of the Rules of Civil Procedure together with Rule 51, and that there is a conflict, in addition to the error, between the Court of Appeals' opinion in this case from the Tenth Circuit and the Court of Appeals of the Second Circuit, Eighth Circuit, Sixth Circuit and the Court of Appeals of the District of Columbia Circuit, we quote from the opinion of the Tenth Circuit in the case before the Court as follows:

> "Defendant filed twenty-four requests for instructions. The failure to give some of these instructions, especially those dealing with defendant's right to the use of the road as a reasonable and prudent person, is assigned as error. Nowhere in the record does it appear that defendant objected to the Court's failure to give its requested instructions. In the absence of such timely objection the question of the Court's refusal to give defendant's instructions will not be reviewed on appeal."

It will thus be noted that the Court of Appeals, Tenth Circuit held that it could not consider the requested instructions for the reason that no proper exception had been taken and cited Rule 51, Rules of Civil Procedure. We should here call to the Court's attention the fact that the requested instructions were in writing, submitted to the trial judge and by the trial judge in writing refused. We

think this is completely and fully sufficient and that the Court of Appeals, Tenth Circuit, erred in holding otherwise than above quoted. In support of the proposition that the requested instructions were properly presented and that the Circuit Court erred in so holding that they were not, and for the purpose of showing the conflict between the Tenth Circuit ruling in this case and the other circuits heretofore mentioned, we call the Court's attention to the following:

In the case of *Montgomery* v. *Virginia Stage Lines, Inc.*, the United States Court of Appeals, District of Columbia Circuit, 191 F.2d 770, in passing upon the construction of Rules 46 and 51, 28 U.S.C.A., said:

> "II. Appellee urges, however, that appellant failed to reserve the point for review as required by Rule 51 of the Fed.R.Civ.P., set forth in the margin. The circumstances pertinent to this contention are as follows:
>
> "(6, 8) A few moments prior to argument to the jury counsel for plaintiff stated, 'If Your Honor please, I have some special prayers which I would like to present.' The court responded, 'Submit your instructions in writing and I will pass upon them.' There ensued a brief discussion about the time likely to be consumed in argument. Then, as the transcript indicates, the arguments were made, followed by a short recess, whereupon the court instructed the jury. It does not appear when the requested instructions were submitted or acted upon, except that they bear the notations to which we have referred, dated the last day of the trial. If they were submitted after the charge was made, or if they had been previously submitted and were pending and unacted upon when the charge was completed, objection to their denial should be deemed

to have been made after the charge, reading Rule 51 with Rule 46. That these Rules should be considered together is held in *Wright* v. *Farm Journal*, 2 Cir., 1947, 158 F.2d 976 where a request for a 'further instruction' is considered equivalent to an objection for purposes of Rule 51. To like effect is *Williams* v. *Powers*, 6 Cir. 1943, 135 F.2d 153, 156, where it is said: 'Rule 51 should be read in conjunction with Rule 46. The purpose of these rules is to inform the trial judge of possible errors, that he may have an opportunity to consider his rulings and if necessary to correct them, and where it appears in the record that the point urged on appeal was called to the attention of the trial court in such manner as to clearly advise it as to the question of law involved, that is sufficient' * * *."

In the case of *Williams* v. *Powers*, 135 F.2d 153, Sixth Circuit, an automobile collision case, in which practically the same question arose as to whether or not proper exceptions were taken and the Court said in the body of the opinion in part as follows:

> "Appellee insists that appellant has waived the errors on which he now relies because of his alleged failure to comply with the rules of Civil Procedure, Rule 51, Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c."

In commenting thereon the Court further stated:

> "Rule 46 of the Rules of Civil Procedure modifies the previous practice of formal exceptions to rulings or orders of the court and makes it sufficient for review that a party at the time the ruling or order of the court is made or sought, makes known to the court, the action which he desires the court to take or his objection to the action taken and his grounds therefor.

"(2, 3) Rule 51 should be read in conjunction with Rule 46. The purpose of these rules is to inform the trial judge of possible errors, that he may have an opportunity to consider his rulings and if necessary to correct them, and where it appears in the record that the point urged on appeal was called to the attention of the trial court in such manner as to clearly advise it as to the question of law involved, that is sufficient. *Sweeney* v. *United Features Syndicate*, 2 Cir. 129 F.2d 904; *Hall* v. *Aetna Life Insurance Company*, 8 Cir., 85 F.2d 447, 451. In our opinion we should consider the objection of appellant to the instruction given."

In the case of *Wright* v. *Farm Journal, Inc., et al.*, Circuit Court of Appeals, Second Circuit, 158 F.2d 976, the Court said in Syllabus 2, 3 and 4 as follows:

"2. Courts.

"A request for further instruction that anything stated which concerns and injures a person in his occupation or profession is libelous *per se* was equivalent to objection to charge which left to jury the question whether charge of communism was libelous. Federal Rules of Civil Procedure, rules 46, 51, 28 U.S.C.A., following section 723c.

"3. Courts.

"Federal Rule 51 requiring written request to be submitted at close of evidence must be construed in light of rule 46 modifying previous practice of formal exceptions to rulings or orders of court and making it sufficient for review that a party, at time ruling or order of the court is made or sought, makes known to court the action which he desires court to take or his objection to action taken and his grounds therefor. Federal Rules of Civil Procedure, Rules 46, 51, 28 U.S.C.A. following section 723c.

"4. Courts. Trial.

"An instruction leaving to jury question whether charge of communism was libelous was reversible error, irrespective of whether request for further instruction, which was equivalent to objection to instruction, was in writing."

In the body of the opinion the Court said:

"(2, 3) The request for a further instruction was in essence equivalent to an objection to the charge, which had left to the jury the question as formulated by the judge whether the words 'used in the article were or were not libelous.' Under Federal Rules of Civil Procedure, rule 46, 28 U.S.C.A. following section 723c: 'Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; * * *.' So far as Rule 51 requiring written requests to be submitted at the close of the evidence might have any pertinency to the case at bar it must be construed in the light of Rule 46. *Williams* v. *Powers*, 6 Cir., 135 F.2d 153, 156.

"(4, 5) The instruction in the charge that left to the jury the question whether the publication was libelous was erroneous. The instruction as given being erroneous, the failure to correct it will require a reversal, irrespective of whether the request was submitted in writing. No objection could be plainer than the request for an instruction diametrically opposed to the one given in the court's charge * * *."

Therefore, we feel that the Court of Appeals, Tenth Circuit, in this case placed upon the petitioner a burden

which is not authorized by the Rules of Civil Procedure and which constituted error in so holding, and that the opinion of the Tenth Circuit in this case if permitted to stand would leave litigants no method of presenting requested instructions and knowing whether their rights were protected. The reason for this statement simply is that when a litigant presents a written requested instruction and the court writes thereon the word, "refused", and signs his name, this must be as we view it sufficient although the Tenth Circuit by its opinion has held to the contrary as we construe the opinion. It is apparent from reading the opinion and observing the requested instructions that the Tenth Circuit Court failed to take into consideration Rule 46 in connection with Rule 51, Rules of Civil Procedure. Clearly, the holding of the Tenth Circuit in this case is contrary to the Rules of Civil Procedure and in conflict therewith and in conflict with the law and the other circuits cited above. A litigant cannot do any more than write the requested instructions, present them to the trial judge, and when he refuses the instructions in writing any further conduct or presentation on the part of counsel would be both obnoxious and improper.

Therefore, this petitioner was certainly denied her rights under the Rules of Civil Procedure and denied a substantial and fundamental right and the trial court committed fundamental error in denying the instructions, and the Court of Appeals in its opinion we think committed fundamental error in its holding above. As to fundamental error, we wish to call the Court's attention to the case of *Liberty Nat'l Bank of Weatherford* v. *Semkoff*, 84 P.2d 438, decided

by the Supreme Court of Oklahoma wherein that Court said:

> "Trial court has duty on its own motion to properly instruct jury on decisive issues made by pleadings and evidence introduced at the trial, and failure so to do constitutes 'fundamental error'."

In the body of the opinion the Court said:

> "* * * We have therefore examined the instructions given by the court merely for the purpose of determining whether or not they are free from fundamental error, and we find that they fail to instruct the jury upon the decisive issues made by the pleadings and the evidence introduced at the trial and are in this respect fundamentally erroneous. See *Guarantee Investment Corp.* v. *Killian*, 180 Okl. 74, 67 P.2d 939; *Williams* v. *Otis*, 155 Okl. 173, 8 P.2d 728; *Oklahoma Producing & Refining Corp. of America* v. *Freeman*, 88 Okl. 166, 212 P. 742. On account of the errors above pointed out the cause must be reversed and remanded for a new trial."

For the convenience of the Court we call attention to the instructions given by the trial court which are set forth as Appendix "B", and the instructions requested by the petitioner, defendant in the trial court, which are hereto attached as Appendix "C".

It will thus be seen that the holding of the Tenth Circuit fails to take into consideration the requested instructions above referred to and fails to construe Rule 46 in conjunction with Rule 51 and simply held as a matter of law in construing the said Rules of Civil Procedure that requesting instructions in writing and refusal in writing by

the judge does not protect a litigant. Surely this is a grave and fundamental error and has deprived this petitioner of a fundamental right. It in effect deprives her of a right to present requested instructions, and not only is fundamental error but is actually a denial of due process of law as the same will hereinafter be pointed out under the question of due process of law.

Therefore, we feel that for the reason above set forth the cause should be by this Court reversed.

Question Presented Number Two

Conflict of decisions of Court of Appeals in opinion with State Court decisions of the Supreme Court of Oklahoma on non-federal questions in violation of the rule and the law as announced by the Supreme Court of the United States in Erie R. R. v. Tompkins, 304 U.S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1188.

Under Proposition Number Two we wish to call to the Court's attention what we believe was not considered by either the trial court or the Court of Appeals, but we think that the Court of Appeals and the trial court in their opinions and judgments fail to take into consideration the decisions of the Supreme Court of the State of Oklahoma and the law of the State of Oklahoma in violation of the law as announced by the United States Supreme Court in *Erie R. R. v. Tompkins*. In this regard the trial court refused and declined to present to the jury in the instructions the theory of the defendant in the trial court, petitioner here, and by failing to give the requested instructions likewise refused to present her theory of the case which was

positively required by state law and the opinions of the Supreme Court of Oklahoma, and the trial court refused to define the statutory term "Assured Clear Distance Ahead." By presenting and giving the instructions as given by the trial court and refusing the instructions as requested by the petitioner herein, defendant in the trial court, both the trial court and the Court of Appeals proceeded in conflict with the law of Oklahoma and the decisions of the Supreme Court of Oklahoma.

Without dealing further with the statement concerning this proposition, we ask the Court to now keep in mind the requested instructions quoted, Appendix "C", and the instructions given by the trial court, Appendix "B." Without comment we call the Court's attention to the following cases with quotations from such cases by the Supreme Court of Oklahoma.

In the case of *Petty* v. *Frank et al.*, 194 Okla. 382, 151 P.2d 926, the Supreme Court of Oklahoma in the Syllabus by the Court used the following language:

> "2. In causes which require a jury trial, it is the duty of the trial court on its own motion to submit to the jury upon proper instructions the tenable theories of the litigants concerning the issues in the action, and a failure to discharge this duty is ground for a new trial, even though no instruction is requested by the parties. *Lacy* v. *Wrenecraft*, 188 Okl. 19, 105 P.2d 731."

In the body of the opinion the Court used this language:

> "• • • Defendants requested no instruction in this regard, but the rule in this jurisdiction is that it is the duty of the trial court, upon its own motion, to instruct upon the decisive features of the case, and fail-

ure so to do constitutes fundamental error. *Liberty Nat. Bank of Weatherford, Oklahoma*, v. *Semkoff*, 184 Okl. 18, 84 P.2d 438; *McIntire* v. *Burns*, 172 Okl. 152, 42 P.2d 143.

"In *Baumgart* v. *Bryant et al.*, 184 Okl. 531, 88 P.2d 635, 637, it is said: 'The rule concerning necessity of requests for instructions does not apply to instructions as to the law applicable to the issues raised by the pleadings and the evidence. Such has always been the rule in this state.'

"In *Lacy* v. *Wozencraft*, 188 Okl. 19, 105 P.2d 781, 782, it is held: 'In causes which require a jury trial, it is the duty of the trial court on its own motion to submit to the jury upon proper instructions the tenable theories of the litigants concerning the issues in the action, and a failure to discharge this duty is ground for a new trial even though no instruction is requested by the parties."

In the case of *Thompson et al.* v. *Galion Iron Works & Mfg. Co.*, 201 Okla. 182, 203 P.2d 438, the Supreme Court said in the body of the opinion:

"It thus appears that there is conflict in the evidence on at least two questions of alleged negligence on the part of the defendants, so the jury might well have failed to find negligence on the part of defendants and might well have found negligence on the part of Brazil as a sole cause of the damage to the grader.

"It is well settled that:

" 'In a case tried to a jury, where the evidence tends to support the same, it is the duty of the court to submit by appropriate instructions the theory of the defense; and failure so to do, at the request of defendant, constitutes prejudicial error.'—*Atchison, T. & S. F. Ry. Co.* v. *Jamison*, 46 Okl. 609, 149 Pac. 195.

"In *Oklahoma Ry. Co.* v. *Christenson*, 47 Okl. 132, 148 P. 94, it was held:

"The instructions of the court should be based upon the issues as made by the pleadings and the evidence, and should present the respective theories of the parties in accordance with the testimony offered in support thereof.

"*Men'en* v. *Richards et al.*, 54 Okl. 418, 153 P. 1177; *St. Louis-S. F. Ry. Co.* v. *Floyd, Adm'x*, 146 Okl. 42, 293 P. 250, 77 A.L.R. 1431; *Atchison, T. & S. F. Ry. Co.* v. *Ridley*, 119 Okl. 138, 249 P. 289; *Johnson* v. *Harris*, 166 Okl. 23, 25 P.2d 1072; *Dunlap & Taylor* v. *Flowers*, 21 Okl. 600, 96 P. 643; *Spurrier Lumber Co.* v. *Dodson*, 30 Okl. 412, 120 P. 934, 935. In the latter case it was held:

"'It is the duty of the court to submit to the jury, and give instructions thereon, any issue, theory, or defense which the evidence tends to support. This right is not affected by the fact that there is countervailing testimony.'

"Plaintiff asserts that there was no error in refusing the requested instructions and each of them for the reason that all the requested instructions required some correction or modification. This may be technically correct, but the requested instructions were sufficient to call the attention of the court to the theory of defendants there relied upon. The court recognized the existence of such a theory but declined to present it to the jury. It is the duty of the court to present the issues and theory of both parties where they are properly pleaded and are supported by the evidence, without a demand or request by either party. The fact that one party may couple with his request a statement of law which is not justified does not relieve the court of his duty in the premises.

"For failure of the court to properly present the theory of defendants which is supported by evidence, the judgment is reversed and the cause is remanded with instructions to grant defendants a new trial."

Without quoting from the cases but stating the holding of the Court in substance we wish to call the following authorities to the attention of the Court:

A litigant is entitled to have his defense or cause of action AFFIRMATIVELY SUBMITTED. *Smith* v. *Maher*, 84 Okla. 49, 202 Pac. 321, 23 A.L.R. 270 (Emphasis ours).

The court when duly requested must submit by instructions any material issue, theory, or defense which is supported by evidence. *Holmboe* v. *Neale*, 69 Okla. 183, 171 Pac. 334.

The right on request to have any material issue, theory, or defense submitted to the jury, if supported by evidence, is not affected by the fact that there is evidence to the contrary. *Holmboe* v. *Neale*, *supra*.

In case tried to a jury, court must submit plaintiff's theory where there is evidence reasonably tending to support it, and a failure to give requested instructions which are correct and applicable, either in language requested or substantially so, is reversible error. *Bristow* v. *Central State Bank*, 68 Okla. 195, 173 Pac. 221.

It will be noted from reading the instructions of the trial court that nowhere was the jury told under what conditions Mrs. Franklin could drive her car at the place in question. She alleged she had the right-of-way. In the instructions, so far as we can find, there is not even the word "right-of-way" used and it was clearly the duty of the trial

court to so instruct without requested instructions, but the Court will note that proper requested instructions were requested defining and telling to the jury under what conditions Mrs. Franklin, petitioner here, had the right to drive her car. We think that her theory was never presented to the jury, and we also wish to call to the Court's attention that in the instructions given by the trial court, the trial court said in effect that the plaintiff in the trial court, J. D. Shelton, had the right to assume that all persons using the highway would use the same in a reasonable, prudent and careful manner, and the defendant in the trial court, Mrs. Franklin, requested the same instruction and asked the court to tell the jury in effect that she had the right to assume that all persons using the highway would use the same in a reasonable, prudent and careful manner, but the trial court refused this instruction. We also wish to call to the Court's attention the fact that if the Court will read carefully the instructions given by the trial court, you will note that the trial court told the jury that if Mrs. Franklin crossed the concrete road or the highway when she could not do so with reasonable safety, she was guilty of negligence. In other words, the court made her the guarantor that she could cross in reasonable safety, while the true test is not whether she could cross in reasonable safety, but whether it appeared to her as a reasonably prudent person under the circumstances then existing that she could cross in safety. A requested instruction was requested setting this out, but the same was refused. There is no reason we know of why Mrs. Franklin was not entitled to have submitted to the jury a definition of the words which are

contained in the Statutes of Oklahoma, "Assured Clear Distance Ahead."

If this Court has not had occasion to review a case involving this phrase it would be difficult for this Court or anyone else to actually understand or know what is meant by this term. It is a legal term used in the Statutes of Oklahoma which requires a definition, especially in view of the fact that jurors probably had as many conceptions and ideas as to what is meant by the term "assured clear distance ahead" as there were jurors, which in this case there were twelve. In addition, so far as we can find, all courts where the question has been raised have required that legal terms be defined to the jury. We call to the Court's attention a few of the cases defining the term "Assured Clear Distance Ahead", and we state the substance of those holdings together with the citations.

To comply with "assured clear distance ahead" rule motorist must not drive at greater speed than will permit him to stop within distance between his vehicle and discernible object obstructing his line of travel. *Farris* v. *City of Columbus*, 85 Ohio App. 385, 85 N.E.2d 605, 607.

Under statute requiring that a motor vehicle be operated so that it can be stopped within distance between vehicle and point where view of highway is cut off or where a discernible object is found in lane of travel of motorist, the distance between motorist and point where his vision ends or is cut off by darkness, by a curve in highway or at the crest of a hill is the "assured clear distance ahead." *State* v. *Cheatwood*, 84 Ohio App. 125, 82 N.E.2d 770, 773.

The words, "assured clear distance ahead", in statute prohibiting operation of automobile at speed greater than will permit driver to stop within such distance, means distance from which discernible objects, reasonably expected or anticipated to be on highway, may be observed. *Snook v. Long*, 241 Iowa 665, 42 N.W.2d 76, 78, 21 A.L.R.2d 1.

"Assured clear distance ahead" is the distance between the motor vehicle of a motorist and any discernible object obstructing his path or line of travel. Gen. Code, Sec. 12603. *Marschal v. Frankman*, Ohio App., 58 N.E.2d 679, 683.

Operator must be able constantly to stop automobile within distance from which discernible objects may be seen ahead of it. *Blowers v. Waterloo, Cedar Falls & Northern Ry. Co.*, Iowa, 8 N.W.2d 751, 753; *Monon v. Jewel Tea Co.*, 227 Iowa 547, 288 N.W. 637, 639; *Anderson v. Kist*, 229 Iowa 462, 294 N.W. 726, 729.

Neither bends nor twists in the highway, crests in the road, dim lights, fog, sleet, rain or blinding lights of approaching motor vehicles excuse one from the duty to drive so that his vehicle may be stopped. *Termuhlen v. Campbell*, 70 Ohio App. 285, 48 N.E.2d 891, 893.

Crest of hill cutting off view of unlighted parked truck and being blinded by lights of oncoming automobile, no excuse. *Smiley v. Arrow Spring Bed Co.*, 138 Ohio St. 81, 33 N.E.2d 3, 5, 6, 7, 9, 133 A.L.R. 960.

The Third Circuit in the case of *Kocher v. Creston Transfer Co. et al.*, 166 F.2d 680, involving an automobile accident, held that the lack of essential definitions in in-

structions is reversible error. The opinion is in part as follows:

"(3) The appellant's argument, in any case, must fail for another reason. The 'assured clear distance ahead' rule is not merely a statutory obligation, but, apart therefrom, is an established principle of law of negligence in Pennsylvania. Thus, in *Hutchinson* v. *Follmen Trucking Co.*, 1939, 333 Pa. 424, at page 427, 5 A.2d 182, at page 183, it was said:

> 'No principle of the law of negligence has been more frequently emphasized in recent decisions than that establishing the duty of the operator of a motor vehicle to maintain such control over it as to enable him to bring it to a stop within the range of its headlights—a mandate fixed and unchangeable, however much the visibility be impaired • • • .'

"And in a footnote to that statement, the Court said:

> 'It is *also* imbedded in the statutory law: Act of May 1, 1929, P.L. 905, Sec. 1002, and amendments' (Emphasis supplied).

"In *Gaber* v. *Weinberg*, 1936, 324 Pa. 385, at page 387, 188 A. 187, at page 188, cited in the *Hutchinson* case, the Court said:

> 'The rule is inflexible BOTH BY STATUTORY REQUIREMENT AND BY THE DECISIONS OF THIS COURT, that the driver of a vehicle upon a highway must have it under such control as "will permit him to bring the vehicle to a stop within the assured clear distance ahead"' (Emphasis supplied).

"Indeed, it appears that the rule referred to was case law in Pennsylvania before the statute in controversy

was enacted. *Cf. Serfas* v. *Lehigh & N. E. R. Co.*, 1921, 270 Pa. 306, 113 A. 370, 14 A.L.R. 791."

Quoting further:

"* * * Assuming, nevertheless, the applicability of the charge, then particularly noteworthy is the lack of any definition of the enigmatic terms 'joint enterprise' and 'joint prosecution for a common purpose.' Lack of essential definition is reversible error."

In a very old case found in 233 Fed. 31, styled *Delaware & Hudson Co.* v. *Ketz*, the Court reversed the case because the trial court did not define the term "proximate cause", and we quote in part from that opinion as follows:

"In an action for the death of a railroad employe, who fell from a bridge, where the evidence was not clear that the negligence of the company in leaving one side of the bridge unguarded was the proximate cause of the accident, it was error for the trial judge to pass over the subject of proximate cause with only an allusion to the fact that the jury must determine whether the death was the proximate result of defendant's negligence, without defining 'proximate cause', though his attention was called to the subject by defendant's requests for instructions that the company was not liable, unless it had been guilty of negligence that was the proximate cause of the death."

The Court said in discussing this matter in the body of the opinion:

"* * * In our opinion, the charge was inadequate on this vital matter, and for this reason alone it would be necessary to reverse the judgment."

Without arguing the matter we would like to say that upon the vital matter of assured clear distance ahead the jury was never told what the term meant although requested to so do. The court merely said that persons were required to drive so as to be able to stop within the assured clear distance ahead. In the case last referred to the Court said:

> "* * * And, second, was his death the proximate result of the defendant's negligence."

See also: *Chicago, Rock Island & Pacific Railroad Company, a corporation* v. *Lint.*

In the case of *Merchants Motor Freight, Inc.* v. *Glen Downing and Independent Truckers, Inc.*, Court of Appeals, Eighth Circuit, 227 F.2d 247, the Court reversed the cause and remanded the same for new trial. This case likewise involves an automobile collision. Syllabi 10 and 11 are quoted as follows:

> "Under Iowa law, legal excuse need not be pleaded by a party in order for such party to be entitled to avail himself of the rule.
>
> "Under Iowa law, if there is evidence sufficient to support legal excuse, court has the duty to submit such issue to jury under proper instructions, particularly when request for such instruction has been made."

In the body of the opinion the Court said:

> "The instruction complained of may be correct as an abstract propositoin of law, but it cannot be said that stating such abstract proposition correctly without explaining its application would not result in misleading or confusing the jury in the face of the record in

this case which without question, shows that the decedent's automobile was on the wrong side of the road at the instant of collision * * *."

In *Johnson* v. *Erie P. R. Co.*, 236 F.2d 353, we quote from page 356 as follows:

"We need not consider how far separately each of the statements referred to would require reversal, since the cumulative effect of the several references is such as to MAKE THE POSSIBILITY OF CONFUSION too great to disregard. We think the plaintiff is entitled to a new trial. Reversed and remanded" (Emphasis ours).

Oklahoma cases construing the Assured Clear Distance Ahead law are many. We call the Court's attention to *Vanmen* v. *Kinsey*, 181 Okla. 92, 72 P.2d 497, and to *Whitney* v. *Douglas*, Okla., 307 P.2d 154, decided February 12, 1957, which last case involved an automobile driver striking a horse at night on a highway. The car was on the right side of the road coming over a crest of a hill. The Court applied the rule and held the driver of the car negligent because he did not have his car under such control as to be able to stop it within the assured clear distance ahead although he came over a hill in the nighttime and the mule was on his side of the road, so to speak. We think a mere abstract charge is not sufficient.

In the case of *Chicago & N. W. Ry. Co.* v. *Green*, 164 F.2d 55, Circuit Court of Appeals, Eighth Circuit, the Court said:

"As against a mere general or abstract charge, a party is entitled to specific instruction on his theory of defense if there is evidence to support it and if a proper request for such instruction is made."

Syllabus 7 is as follows:

> "A request for instruction, though not entirely perfect, may impose upon trial court duty to give a more specific instruction on particular issue, where it soundly appears that such instruction is needful to enable jury to intelligently determine the question."

We most respectfully ask this Court to read from the following authority:

Corpus Juris Secundum, page 816b, Theories, Article 301 and Article 302 on page 819 of the same Volume, and especially Article 303 on the same page setting forth the duty of the court to affirmatively submit the issue raised by the pleadings and the evidence.

Under the instructions as given by the trial court there was no way this jury could intelligently determine the questions involved. The word "Right-of-Way" was never used or defined. The words "Assured Clear Distance Ahead" were never defined, and we for emphasis' sake wish to again say to this Court that all of these matters were properly requested in the requested instructions and we think they were properly submitted to the trial court because the instructions were in writing and the trial court wrote thereon the word "Refused." The Court of Appeals we think declined to consider these requested instructions for the reason as noted in the opinion that apparently that Court felt they were not properly excepted to. Nevertheless, we think we have pointed out the authorities showing that the Court of Appeals was in error in so holding and that the instructions were properly presented to the trial court and should have been given and a failure to do so

failed to present to the jury the Oklahoma law, and that the opinion of the Court of Appeals in this case is contrary to the law of Oklahoma and the decisions of the Supreme Court as announced by the Supreme Court of Oklahoma and as set forth in the Statute.

Question Presented Number Three

The Judgment of the District Court for the Eastern District of Oklahoma and the Opinion of the Circuit Court of Appeals above quoted in this case denies to the petitioner her constitutional rights and is violative of Amendment V of the Constitution of the United States in that it denies her due process of law.

When we talk of the term "due process of law" under the Fifth Amendment we feel we should give to the Court some of the many definitions of that term by this Court, that is, the Supreme Court of the United States, and the many courts over the nation, and we will attempt briefly to call the Court's attention to why we think these fundamental errors did deny to this petitioner due process of law under the Fifth Amendment to the Constitution.

We are fully aware that the Fifth Amendment to the Constitution guarantees to every citizen of the United States due process of law, and the Fourteenth Amendment to the Constitution of the United States only requires the states to give to the citizens within its borders equal protection of the law, and that actually the Fourteenth Amendment has nothing to do with due process of law as applied in this case, and therefore, only the Fifth Amendment to the Constitution of the United States will be discussed in presenting this matter to this Court.

> "The term 'due process of law' is not susceptible of exact or comprehensive definition. Its meaning has been developed in the cases by a process of judicial inclusion and exclusion."

This quotation above given will be found in *Gilbert* v. *Elder*, 65 Idaho 383, 144 P.2d 194, 196. The Supreme Court of the United States used this language in substance, that "due process of law" has never been a term of fixed and invariable content. See: *Federal Communications Commission* v. *WJR, The Goodwill Station*, 69 Sup. Ct. 1097, 337 U.S. 265, 93 L. Ed. 1353. Also 12 C.J., p. 1188, note 54.

It appears that the Supreme Court of the United States has consistently refused to attempt a comprehensive definition of what is meant by due process of law. See *Douglas* v. *City of Jeannette*, C.C.A. Pa., 130 F.2d 652, which case was affirmed in 63 Sup. Ct. 877, 319 U.S. 157, 87 L. Ed. 1324. It has been said that, as is universally conceded, due process of law is not susceptible, or does not admit, of exact, precise, or comprehensive definition, its meaning necessarily varying with the dissimilarity in the proceedings in which it is required; that it is too broad a term to admit of a short definition which will cover every situation. Supporting this statement above, we call now to the Court's attention a few of the cases so holding. In a Wyoming case that Court in *Pirie* v. *Kamps*, 68 Wyo. 83, 229 P.2d 927, 929, 26 A.L.R.2d 647, used this language:

> "• • • the concept is indefinable by legalistic formula."

In the case of *People, on Complaint of McDonald* v. *Simonian*, 18 N.Y.S.2d 371, the New York Court said:

> "It is difficult to define with precision the exact meaning and scope of the phrase 'due process of law'."

Also in the case of *In re Security Trust Co. of Rochester*, 70 N.Y.S.2d 260, and 92 N.Y.S.2d 308, 97 N.Y.S.2d 922, that Court said:

> "Any definition of 'due process of law' would probably fail to comprehend all the cases to which it would apply."

The Indiana Court in *Warren* v. *Indiana Telephone Co.*, 26 N.E.2d 399, 409, said:

> "The constitutional guaranty of due process is one of broad and comprehensive implications, not readily definable with precision."

12 C.J., p. 1188, note 55, says:

> "As applied to different classes of cases, courts, by process of inclusion or exclusion, apply the principles involved in the phrase."

The Court also said:

> "From the duty of the citizen to obey the laws of the state arises the corresponding right of the citizen to insist that the state comply with its own laws, and to demand, in the language of the constitution of the state that he be not deprived of his life, liberty, or his property unless by the judgment of his peers or the law of the land."

See the case of *U. S. ex rel Valotta* v. *Ashe*, D.C. Pa., 2 F.2d 735, 743, reversed on other grounds, 46 Sup. Ct. 333, 270 U.S. 424, 70 L. Ed. 662.

> "This provision of our organic law guarantees that every one shall have his life, liberty, property, and immunities protected by the general rules characteristic of, basic to and existing in our society under our system of jurisprudence."

See *State ex rel Sweezer* v. *Green*, 360 Mo. 1249, 232 S.W.2d 897, 903, 24 A.L.R.2d 340.

In *U. S. ex rel Montgomery* v. *Ragen*, D.C. Ill., 86 F. Supp. 382, this language is used:

> "Fair play is the essence of due process."

See *Galvan* v. *Press*, Cal., 74 Sup. Ct. 737, 742, 347 U.S. 522, 98 L. Ed. 911.

> "The concept of due process stems from our American ideal of fairness."

See *Bolling* v. *Sharpe*, App. D.C., 74 Sup. Ct. 693, 694, 347 U.S. 497, 98 L. Ed. 884.

JUDGE COOLEY defined due process and that definition is set forth in *Dulich* v. *Blair*, D.C. Wash., 3 F.2d 302. The Supreme Court of Oklahoma defined it in *Wilhite* v. *Cruce*, 70 Okla. 70, 172 Pac. 962. Another definition which is interesting is the one found in *U. S. ex rel Montgomery* v. *Ragen*, cited *supra*, where due process is defined as follows:

> "Due process of law is that process of impartial law which is binding because it is right. It senses the mistakes of the past and wants to rectify them. It provides men with faith."

As to whether the Fourteenth Amendment applies to both substantive and procedural rights, we call the Court's

attention to the fact that courts have gone beyond the literal meaning of "due procedure" and have brought within it substantive as well as procedural rights. See *Albritton* v. *City of Winona*, 178 So. 799, 58 Sup. Ct. 766, 303 U.S. 627, 82 L. Ed. 1088, and an Oklahoma case cited as *Skinner* v. *State ex rel Williamson*, 189 Okla. 235, 115 P.2d 123, reversed on other grounds 62 Sup. Ct. 1110, 316 U.S. 535, 86 L. Ed. 1655, conformed to 195 Okla. 106, 155 P.2d 715.

There are, of course, many more definitions, but actually they all when summarized and analyzed simply mean fair play.

In presenting the question as to whether or not the petitioner here was accorded a fair trial and whether or not she was denied due process of law, we call the Court's attention to these facts:

(a) The petitioner was entitled to have the case presented to the jury under proper instructions presenting her theory and defense herein. We think this definitely was not done.

(b) She was certainly entitled to have the jury instructed as to what was meant by the term "assured clear distance ahead" as this was the only way the jury could understand the law and she specifically pleaded the Oklahoma Statute, but this was refused.

(c) Since the court did instruct the jury that the plaintiff in the trial court, J. D. Shelton, had the right to assume that all persons would use the highway with reasonable and ordinary care, she was certainly entitled to have the court instruct the jury that she had the right to

assume the same thing and requested instruction was presented asking the court to so instruct the jury, but the court refused.

Therefore, the plaintiff in the trial court had the advantage of having the right to assume that other persons would use the highway in a reasonable and prudent manner, but the petitioner here did not have that right. It is fundamental that the rights of the parties are reciprocal and mutual, and we quote from the United States Court of Appeals in the case of *Oklahoma Natural Gas Co.* v. *McKee*, 121 F.2d 583, Tenth Circuit. In the body of the opinion on page 584 this language appears:

> "(1-5) Of course it is elemental that in law the duties incident to ordinary care which appellant and appellee owed to each other, are mutual and reciprocal. Likewise, each had a right to indulge in the presumption that the other would observe the rules of the road and otherwise exercise ordinary care * * *."

Next, we wish to call to the Court's attention what we think was unfair in the way this case was tried, and the record reflects that the following took place and which we think clearly reflects a denial of due process of law because we do not think the law was followed, and we say this with greatest respect to the trial court and the appellate court. When it came time to argue this case there were two lawyers representing the plaintiff in the trial court, respondents here, namely Mr. Mountcastle and Mr. Smith. There was one lawyer who would argue the matter on behalf of the defendant, namely John B. Ogden. The following occurred:

"Mr. Ogden: Your Honor, as I understand it, they are dividing the time equally and they must use half of their time first.

The Court: Well, I don't know of any rule about that.

Mr. Ogden: If the Court would require them to make a full and complete argument of everything so I can answer it is what I mean. The rule as I understand it is that they have to make a complete argument and I just answer that because it is something that after I quit talking I wouldn't be able to answer.

The Court: Well, Judge, the Court can't control that.

Mr. Ogden: If your Honor please, they were supposed to make the full argument on the opening so I could answer.

The Court: Well, no, I can't make them do that, you know. How much time do you want, Mr. Mountcastle?

Mr. Mountcastle: Five minutes.

(IN THE HEARING OF THE JURY)

(Whereupon Mr. Mountcastle proceeds with his argument • • •.)"

It should be apparent from the above excerpt of the transcript that defendant's counsel made a timely and proper objection and urged the court to enforce the rule applying to oral argument. Then at the close of Mr. Mountcastle's five-minute speech there followed another request, as shown by the following excerpt:

"Mr. Ogden: If your Honor please, I think they have to present their whole matter so I can answer. I am positive that the rule provides that

Mr. Smith: If the Court please, I object to counsel talking before the jury.

(THE FOLLOWING AT THE BENCH OUT OF THE HEARING OF THE JURY)

Mr. Ogden: Comes now the defendant and shows to the Court that Mr. Mountcastle stated that, to the jury, he would argue the question of liability or negligence and that Mr. Smith would argue the amount of damages and only used five minutes, leaving Mr. Smith 25 minutes, and the defendant now requests the Court to direct Mr. Smith to make such argument as he deems proper, or rather Mr. Mountcastle, on the question to be presented in the damage suit so that there will not be something that I cannot answer. I am requesting that the Court require that argument.

The Court: Well, overruled."

We think this procedure as outlined above absolutely prevented the petitioner herein from having a trial in accordance with the law and violated the due process clause. It certainly is not fair and we do not think it should be said that this was in the discretion of the trial court. If that is true, the trial court could have permitted the lawyer for the plaintiff to argue one minute and merely state his name and sit down or not argue at all and use all of his time in the closing argument. We wish to call to the Court's attention the following authorities with respect to the question of argument in the belief that this Court will hold that this was not fair play.

Corpus Juris, Volume 64, page 248, Article 267b, is in part as follows:

"PARTICULAR SCOPE OF OPENING AND CLOSING ARGUMENTS. It is the duty of counsel having the burden of the issues to present the whole case as he relies on it in his opening argument, and the opposing attorney may then discuss the propositions he has presented and present his own views of the case, after which, in conclusion, counsel having the burden should, in his reply, be confined to the points, grounds, and authorities exhibited, * * *."

The Court will note the citations are many under this statement in Corpus Juris.

We call to the Court's attention the following: *Atchison, T. & S. F. Ry. Co.* v. *Lambert*, 32 Okla. 665, 123 Pac. 428, wherein the Court said in part:

"* * * The right of argument is of the highest importance, and should be safeguarded in such a way as to protect both parties. He upon whom the burden rests has the right to open and close, but it is manifestly unjust to permit him to make a wholly incomplete and unfair presentation of the case, and reserve the whole force of the argument for a closing speech, as this practice does not give to the opposing party a fair chance to reply."

In *Rennie* v. *J. I. Case Threshing Mach. Co.*, 94 Okla. 26, 220 Pac. 626, the Court used this language:

"* * * We are unable to determine the extent of injury that might have been suffered by the defendant in the trial of the cause on account of his request to open and close the argument being refused, as a report of the argument of respective counsel is not before us. Otherwise error was not committed.

"Therefore we recommend that this cause be reversed and remanded for new trial."

In the case of *Fire Ass'n of Philadelphia* v. *Farmers' Gin Co.*, 39 Okla. 162, 134 Pac. 443, the Court used this language:

"The party bearing the burden of proof has the right to open and close the argument. His opening argument should be a complete and fair presentation of his theory of the case."

In the rather recent case of *Kinder* v. *Barnett Tank Line, Inc.*, 200 Okla. 370, 194 P.2d 864, the Court used the following language:

"* * * It seems to us that the weight of authority and sound reason support the following rule. In his opening argument the plaintiff should fully and fairly present his case to the jury.

* * * * * * * * * *

"It is certainly important to the administration of justice that no one be deprived of the full benefit of counsel. And it ought not to be allowed to counsel by any strategy or artifice to prevent a fair hearing. * * * Usually the plaintiff's opening must indicate what the defendants are expected to meet. They have a right to know what arguments are to be urged against them, and this they can only learn from the opening, inasmuch as they have no reply."

We do not think it fair to permit any trick or scheme to take away from a litigant the rights given to them under the law. Clearly, in this case this type of proceedings was wholly unfair to Mrs. Franklin. Her lawyer asked the court to require opposing counsel to make a full and complete

argument so that Mrs. Franklin's counsel could answer it. This was overruled and denied. All counsel could do is make the request. We think the court abused his discretion and he actually did not have the discretion to permit counsel to thus unjustly take advantage in the trial of this case, and by virtue thereof this cause should be by this Court reversed.

Under the Revised Rules of the United States Court of Appeals for the Tenth Circuit, Rule 20, with reference to oral arguments, page 14, paragraph 3, this Court says in such Rule:

> "PROVIDED ALWAYS, That a fair opening of the case shall be made by the party having the opening and closing arguments."

We wish to comment that this Court knows it is not fair when lawyers have 30 minutes to argue a case and state in court that the one opening will use only five minutes and the counsel who opened the argument stated to the jury that he would not argue but one question and that was the question of liability and that he would not argue the whole case the question of damages and so forth, and that his associate counsel would take up these other matters and take 25 minutes of the 30 minutes to make the closing argument. Certainly this is an unusual way to try a lawsuit and we think an unlawful way. This simply is not fair play or due process of law, and it is a matter of importance and the practice will grow unless stopped. We think the Supreme Court of the United States laid down a rule which would have and will have great weight in the administration of justice with reference to the argument and

conduct of lawyers and parties. The Supreme Court of the United States in the case of *New York Cent. R. Co. v. Johnson*, 279 U.S. 310, 49 Sup. Ct. 300, said in part as follows:

> "* * * The failure of the trial judge to sustain petitioner's objection, or otherwise to make certain that the jury would disregard the appeal, could only have left them with the impression that they might properly be influenced by it in rendering their verdict, and thus its prejudicial effect was enhanced. See *Hall v. United States*, 150 U.S. 76, 81, 37 L. ed. 1003, 1007, 14 Sup. Ct. Rep. 22; *Graves v. United States*, 150 U.S. 118, 121, 37 L. ed. 1021, 1023, 14 Sup. Ct. Rep. 40; *Wilson v. United States*, 149 U.S. 60, 68, 37 L. Ed. 650, 652, 13 Sup. Ct. Rep. 765. That the quoted remarks of respondents' counsel so plainly tended to excite prejudice as to be ground for reversal is, we think, not open to argument. The judgments must be reversed with instructions to grant a new trial.
>
> "Respondents urge that the objections were not sufficiently specific to justify a reversal. But a trial in court is never, as respondents in their brief argue this one was, 'purely a private controversy * * * of no importance to the public.' The state, whose interest it is the duty of court and counsel alike to uphold, is concerned that every litigation be fairly and impartially conducted and that verdicts of juries be rendered only on the issues made by the pleadings and the evidence. The public interest requires that the court of its own motion, as is its power and duty, protect suitors in their right to a verdict uninfluenced by the appeals of counsel to passion or prejudice. See *Union P. R. Co. v. Field*, 69 C. C. A. 536, 137 Fed. 14, 15; *Brown v. Swineford*, 44 Wis. 282, 293, 28 Am. Rep. 582. Where such paramount considerations are involved, the failure of counsel to particularize an exception will not preclude this court from correcting the error. *Brasfield v. United*

States, 272 U. S. 448, 450, 71 L. ed. 345, 346, 47 Sup. Ct. Rep. 135."

There is no way to tell what would have been the result of this trial if this trial had been conducted in accordance with what we think is required by the laws of Oklahoma and the laws of the United States because we wish to specifically call to this Court's attention that the jury remained out deliberating more than four hours and returned and told the court that they could not agree on any of the claims or any of the defenses of any of the parties. In other words, they were a hung jury after four hours of deliberations. They were released for the night, came back at 10:00 o'clock, a.m., the next day and deliberated until noon, which was two hours, or shortly past noon, and finally returned a verdict against this petitioner for $82,000.00 or approximately that amount of money.

We think any one of the errors above could, should and did influence the jury and prevent a fair trial and that the verdict would have been the other way had she been accorded her rights as guaranteed to her by the Constitution of the United States.

There are many times when one error might be held or may be held to be harmless, but when there are many errors we think that a court should not apply the harmless error doctrine. As said in *Johnson* v. *Erie P. R. Co.*, 236 F.2d 353, and on page 356:

> "We need not consider how far separately each of the statements referred to would require reversal, since the cumulative effect of the several references is such as to MAKE THE POSSIBILITY OF CON-

FUSION too great to disregard. We think the plaintiff is entitled to a new trial. Reversed and remanded" (Emphasis ours).

In concluding we say we do not believe there could be serious doubt but what this case was not tried as ordinary cases are tried and it was not tried in accordance with the established law of Oklahoma in many respects, and one other unusual thing in this case, and we think it is very unusual, and ask the Court to consider it along with the error above, and that is the conduct of the parties themselves in the presence of the jury. While the plaintiff in the trial court, J. D. Shelton, was on the witness stand testifying, he burst forth into tears and began weeping and wailing, trembling and shaking while he was being questioned by his own lawyer, and there was no occasion whatever for it, and then his wife, another plaintiff Venera Shelton, sitting in the courtroom in the presence of the jury at the counsel table, jumped up and began crying and of course this excited the jury and counsel, and there were ladies on the jury and it is reasonable to assume that such an outburst must have excited sympathy and this is not fair play. The courtrooms should be guarded as we view it as a sacred place where justice is administered without giving either side an advantage by the parties weeping and wailing or advantage in the argument. There is no reason to do it. It creates a feeling in the minds of litigants that the courthouse is not a temple of justice but a place for advantage by any means so long as they can win. We say this with due respect to everyone concerned in the trial of this case, but nevertheless, there is no way to tell what effect all this has on a jury and we know it is not

the ordinary and usual course of proceedings and we know it is not right. We now call to your attention the following, showing what happened. Mr. Smith, the attorney for Mr. Shelton, was examining Mr. Shelton while Mr. Shelton was on the witness stand, and we quote in part as follows:

Q. "All right, sir. Now have you seen the pictures here that were introduced today in evidence of the station wagon?

A. Yes, sir.

Q. I just want to hand that to you and let you look at them and tell the jury then whether or not that represents the condition that you saw the station wagon immediately following the accident. You are first looking at Plaintiffs' Exhibit Number, let's see, Plaintiffs' Exhibit Number 4. Try to compose yourself, Mr. Shelton, and look at this Exhibit No. 4 now.

Mr. Ogden: If your Honor please, I would like to either approach the bench and make a record or have the jury excused.

The Court: Well, approach the bench.

(The following at the bench out of the hearing of the jury)

Mr. Ogden: Comes now the defendant and moves the Court for a mistrial in this case, for the reason that the conduct of both plaintiffs, Mr. and Mrs. Shelton, is such that it has brought about a condition that it would not be fair for us to try the case with this jury, Mr. Shelton sitting, with the witness crying loudly and wiping his tears from his face, right now in the presence of the jury, and Mrs. Shelton setting back here and crying and wiping tears from her face in the presence of the jury, and we know that the jury couldn't try the

case without being prejudiced, we think it would not be fair to the defendant to try the case under this circumstance.

The Court: Overruled.

Mr. Ogden: If the Court please, so I might have a record, there is no question but my statement is correct as to the facts?

The Court: No, of course I'm not passing on that. You have made your statement and of course the Court is not going to try to add to it or take anything from it."

We quote briefly from *Stutz* v. *Milligan et al.*, 223 S.W. 128. This case presents we think to the Court sound authority for supporting our position with reference to our motion for a mistrial. That Court said:

"Where in a wife's action for alienation of affections the husband was presented as a witness by defendants, the conduct of the wife in becoming hysterical and crying aloud at sight of him held to justify a discharge of the jury and the grant of a new trial."

The Court further said in this case:

"A new trial was granted in this case for the reason that the learned trial judge felt that the actions of plaintiff in the presence of the jury were such as to create, perhaps, an undue sympathy for plaintiff and a prejudice against respondents.

• • • • • • • •

"Courts cannot be too careful to see that juries are entirely free from improper influences, or even from a suspicion of such."

In the case of *Ullom* v. *Griffith*, 263 S.W. 876, the Court said:

"But we are of the opinion that a new trial should have been granted in this case, because of the court's failure to discharge the jury and declare a mistrial on account of what transpired, because the first juror questioned showed clearly his feeling for plaintiff and against defendant * * *.

"We think, in view of the whole record in this case, that the trial court erred in not discharging the jury and granting defendant a new trial. Therefore the Commissioner recommends that the judgment be reversed, and the cause remanded."

This case was reversed.

We most respectfully ask the Court, however, to read these cases because those statements alone would not give the Court a complete picture of the circumstances surrounding those trials and it is necessary that we make our quotations brief on account of the fullness of this brief.

In the case of *Tom Reed Gold Mines Co. v. Berd*, 260 Pac. 191, the Supreme Court of Arizona said:

"While we are impressed that the rule just stated is sound and should be generally followed, we cannot but feel that in the exercise of a sound discretion the court might well have discharged the jury and called another, free from the possible unmerited sympathy that might have been occasioned by the unfortunate conduct of plaintiff. No doubt, the impression made by plaintiff's conduct lingered with the jury throughout the case, and, honest men though they were, might have been a determining factor in their verdict * * *."

The Court further said in the body of the opinion:

"We conclude, not for one, but for the many errors that have crept into the record, the defendant is entitled to a new trial free from these errors."

The Court concludes with the following statement:

> "We think the record is so shot with error as to require a new trial. The order is that the judgment be reversed, and the cause remanded."

There is no question but what the above is the record and is what took place in the presence of the jury. A mistrial was requested and denied. Exhibit 4 was merely a picture of an automobile which should not cause a person to cry.

With reference to Question Three, we feel that this record is so shot with error, to use the language of the last authority, that it must require a reversal. We know of no reason why it is necessary in this country to permit cases to stand so full of error. A new trial will not hurt anyone if they are right in the first place, and we feel that the cause should be reversed for the reasons hereinabove set out under Question Number Three.

Question Presented Number Four

The trial court and the Court of Appeals denied the petitioner her constitutional rights guaranteeing her a fair and impartial trial on the ground of harmless error.

As to what is harmless error and what is not harmless error and what is judicial discretion and what is not judicial discretion, we shall attempt to outline what we think and some of the opinions thereon.

We feel that the opinion of the Court of Appeals misconstrues the harmless error doctrine and misconstrues as applied to the facts in this case the term "discretion of the

trial court." We will now attempt to point out the true test as to harmless error and discretion of the trial court.

We call to the Court's attention first the case of *Pacific Mut. Life Ins. Co. of California* v. *Tetirick*, 185 Okla. 37, 89 P.2d 774, 776, and we quote therefrom as follows:

> "We must conclude that this instruction is erroneous, and is not cured by any other instruction. We cannot say from the whole record that the issues were tried and determined in fairness and justice. We cannot say that no injustice was done defendant and we therefore find no basis whatever for application of the harmless error doctrine. However grave may be the condition of plaintiff, we cannot escape the conclusion that the trial court was led into reversible error in this instruction, so permitting the jury to improperly fix on defendant this severe liability. We are impressed with the thought that such verdict would not have been returned, but for the erroneous requirement of this instruction. We must reverse the judgment and remand the cause for a new trial, and it is so ordered."

The California Court in *Merchants' Ice & Cold Storage Co.* v. *Globe Brewing Co.*, 78 Cal. App.2d 618, 177 P.2d 963, 967, said in substance that a "harmless error" is an error which does not prejudice the substantial rights of the appellant or does not affect the result of the action.

In the case of *State* v. *Britton*, 27 Wash.2d 336, 178 P.2d 341, that Court defined "harmless error" in substance as follows:

> "A 'harmless error' is an error which is trivial, or formal, or merely academic, and not prejudicial to the substantial rights of the party assigning it, and in no way affects the final outcome of the case."

The Federal Courts have passed many times on the question of harmless error under Rule 61, Federal Rules of Civil Procedure, and the Court of Appeals of the District of Columbia said through Judge Prettyman in the case of *Billeci* v. *United States* (C.A., D.C., 1950), 87 App. D.C. 274, 184 F.2d 394, 402, 403, 24 A.L.R.2d 881, in part as follows:

> "A judge cannot impinge upon that right any more than he can destroy it. He cannot press upon the jury the weight of his influence any more than he can eliminate the jury altogether * * *."

This case was reversed because of the comment and conduct of the judge in commenting.

In Moore's Federal Practice, Vol. 7, page 1021, we find that the substance of the author's statement is that in order to determine whether or not a ruling or admission of evidence is harmless or prejudicial must be solved by determining whether substantial rights of party have been violated, which in turn depends on the circumstances of each case. Many cases are cited supporting this rule. Consequently, it becomes more a matter before this Court after reading the record to determine whether any substantial rights have been violated.

We have heretofore pointed out we think instance after instance where they were violated. Therefore, the error could not be harmless. Certainly the proper instructions are the very fundamental ingredients of any trial. Certainly the definitions of legal terms should be given, and a failure to do so takes away a fundamental right. Certainly the argument of counsel should be conducted in accordance

with the law, and we have pointed out this was not followed and time after time, and yet many of these errors are referred to in the opinion as "harmless error", although the case was a serious case as to both parties and it took several days to try it and the jury deliberated more than six hours before being able to reach any kind of a verdict. Therefore, we say that if the case had been tried in the ordinary way we feel beyond a question of a doubt that this verdict would have been for the defendant or the petitioner here. There is no way to know, but as we view it, the Constitution does require that the petitioner have the same kind of trial that the plaintiff has. This as we view it was not accorded to her although error is admitted it is claimed to be harmless. We call to the Court's attention one other case under harmless error, which is an Oklahoma case. The Criminal Court of Appeals of the State of Oklahoma in construing the harmless error doctrine of Oklahoma in the case of *Kizer* v. *State*, Okla. Cr. App., 78 P.2d 831, 835, used the following language:

> "Where the record reveals that a defendant has been deprived of a substantial right, the error is not 'harmless,' within operation of statute providing that no judgment shall be set aside or new trial granted on ground of misdirection of jury, improper admission or rejection of evidence, or any error in pleading or procedure unless it appears that error probably resulted in miscarriage of justice or constitutes substantial violation of constitutional or statutory right. 22 Okl. St. Ann. Sec. 1068, St. 1931, Sec. 3206."

Whether a substantial right is invaded by the admission of irrelevant and incompetent evidence depends on the circumstances of each case. In *University City, Mo.* v.

Home Fire & Marine Ins. Co. (C.C.A. 8th, 1940), 114 F.2d 288, 295, 3 FR Serv. 61.411, Case 1, a city brought an action on fire policies against the insurers who contended that the fire did not occur in the building described in the policies. The trial court allowed the admission of exhibits consisting of expired policies issued by other companies and correspondence concerning such policies in order to assist it in construing the policies in suit. There was no evidence that the insurers in issuing the policies relied upon the information contained in the exhibits, and the exhibits were given an undue emphasis before the jury. The Circuit Court of Appeals for the Eighth Circuit, reversing for the admission of prejudicial evidence, said:

> "* * * Neither this statute (28 U.S.C. Sec. 391 [1940]) nor Rule 61 * * * were intended to deprive a litigant of a substantial right in the trial of a case, civil or criminal. Whether or not a substantial right is invaded by the admission of irrelevant and incompetent evidence must depend upon the circumstances of each case. In this instance it so happened that the incompetent evidence was given great prominence upon the trial. It was given an emphasis before the jury altogether out of proportion to its merits. It was excluded when it was first offered and nearly two days later the case was reopened and its admission reconsidered. As the trial worked out the evidence was highly prejudicial."

The case of *Dow v. Carnegie-Illinois Steel Corp.* (C.C.A.3rd, 1948), 165 F.2d 777, was reversed for the reason that the trial court admitted evidence elicited from the plaintiff when called as on cross-examination showing that there had been marital difficulties between the plaintiff and the deceased before their reconciliation prior to the de-

ceased's death. This evidence was admitted on the question of damages and as tending to show that the plaintiff would have received little or no benefit from the deceased had he lived. The Circuit Court of Appeals for the Third Circuit concluded that such evidence was inadmissible and that the possibility of substantial prejudice from its admission was enough to invalidate the verdict.

It is the rule also, as we think, that the error in the admission of evidence or any type or kind of error is likely to be less harmful before the court without a jury than in an action with a jury.

In the case of *Downie* v. *Powers* (C.A.10th, 1951), 193 F.2d 760, 766, 767, 16 FRServ. 51.21, Case 1, the Court in discussing the trial court's failure to comply with Rule 51 by informing counsel for the plaintiff as to which requested instruction would be given and which would be denied, Judge Murrah said:

> "No one would say that failure to literally comply with the requirements of the Rule would be reversibly erroneous • • •.
>
> "Here, the trial court refused after repeated requests, to indicate which of the requested instructions would be refused and which would be given, or to indicate generally what his instructions would be. This is not an ordinary case in which the law is settled by adjudicated cases. It involves a conspiracy to violate civil rights in which private persons are alleged coconspirators with public officials. There was a contrariety of views concerning the applicable law of the case, and the questions were not authoritatively settled until after trial. See *Collins* v. *Hardyman*, *supra* (341 US 651, 71 S Ct 937, 95 L ed 1253). The applica-

ble law of the case undoubtedly entered into and affected the course of the argument to the jury. Counsel did not know what those instructions would be until after his argument, and we think in these circumstances, the failure of the court to observe either the letter or the spirit of the rule was prejudicial error."

Therefore, we say as to whether any given state of facts constitute harmless error or do not constitute harmless error must be determined by whether or not it affected a substantial right of the party complaining, whether it be in the admission of evidence, the rejection of evidence, the giving of instructions or any other part of the proceedings of a trial, and these must be determined in each case by the facts and circumstances in each particular case. We think there is grave danger in applying too freely two terms. One is the phrase "harmless error" and the other is "sound discretion of the trial court." The opinion in this case of the Circuit Court we think lends too much credence to what it considers discretion of the trial court. We don't think discretion can be substituted for law. That is a fixed rule of law.

If this Court should have detailed to it a case wherein the argument was conducted and permitted as it was in this case, the first question this Court would ask would be: Why was there any reason to do this? The answer would have to be: None, except the plaintiff in the trial court wanted at least a reasonable advantage. There has to be a purpose in all things and we do not criticize the attorneys for the plaintiffs in the trial court, respondents here, for taking advantage if they can do so, but we do not believe it is right to permit this practice in any court, much less a

United States Court. We know it is not fair, we know it is in violation of the rules of law, and if before the Supreme Court of the United States some lawyer should rise who had the burden of presenting the matter and say to the Supreme Court of the United States: "I will only argue the matter four or five minutes and will not cover the whole case, and then after the other side responds I will take 25 minutes and close", this Court would not tolerate it one second. The Circuit Court of Appeals, Tenth Circuit has a rule requiring the one having the burden to make a full and complete argument. The Law of Oklahoma requires it as we have cited, and now the opinion of the Circuit Court disposes of that matter simply by saying it was in the "discretion of the trial court." Nothing is in the discretion of the trial court which will take away a substantial right of a party as we view the law. The court by discretion cannot make law or change law as was done in this case. The Oklahoma Supreme Court has defined discretion of the trial court in the case of *Burke v. McKenzie et al.*, 313 P.2d 1090, decided June 25, 1957, reversed the trial court for an abuse of discretion, and in discussing the question of judicial discretion used the following language:

> "A trial court's discretion to do, or to refuse to do something, in certain instances is a legal discretion, to be exercised in accordance with fixed principles of law. The term (judicial discretion) is the subject of many definitions, though generally recognized as being synonymous with judicial power. In *Kidd v. Commonwealth* (Ky.), 74 S.W.2d 944, 'Judicial Discretion' was said to be an impartial discretion, guided and controlled by fixed legal principles, a discretion to be exercised in conformity with the spirit of the law (an equitable decision as to what is proper and just

under the law) and in a manner to subserve and not defeat the substantial ends of justice.

"And in *Pickett* v. *C., R. I. & P. Ry. Co.*, 169 Okla. 123, 36 P.2d 284, we recognized this principle in the following statement:

" 'There are many definitions of judicial discretion. As said in *Deeds* v. *Deeds*, 108 Kan. 770, 196 P. 1109, 1110: " 'Judicial discretion' implies the liberty to act as a judge should act, applying the rules and analogies of the law to the facts found after weighing and examining the evidence"; and as stated in *Smith* v. *Hill* (C.C.A.) 5 F.2d 188: "Judicial discretion is not the indulgence of a judicial whim, but is the exercise of judicial judgment based on facts and guided by laws"; and in *Conway* v. *Minnesota Mutual Life Insurance Co.* 62 Wash. 49, 112 P. 1106; 40 L.R.A.(N.S.) 148: "The term 'Judicial discretion' may be defined generally as a discretion which is sound and guided by fixed principles of law " '."

For making the comparison, we wish to use in this brief the word "abuse of discretion" and give to the Court a definition thereof, and we think that if there was a discretion it was certainly abused. The term has been defined, that is abuse of discretion, variously as meaning act done or step taken not according to the regular course of proceeding. See *Ramsey* v. *Holland*, 172 N.E. 411, 35 Ohio App. 199, 201, 202. Effecting an injustice, see *Hale* v. *Hale* (Cal. App.), 45 P.2d 246, 247. Clear error of law in the circumstances, see *Grant* v. *Michaels*, 94 Mont. 452, 460, 23 P.2d 266, 270. Manifest error, see *State* v. *Robinson*, 111 S.C. 467, 468, 98 S.E. 329, and also *B. F. Avery & Sons* v. *Bennett*, 104 S.C. 419, 420, 89 S.E. 466. Unreasonable departure from considered precedents, and settled judicial custom, see *In re Horowitz*, 250 Fed. 106, 107. Use of discretion contrary to

established usage, see *Miller* v. *Lash*, 4 Pa. Super. 292, 299, and 1 C.J., p. 373, note 19.

When the trial court permitted counsel to argue this case in the manner in which they argued it, that action of the trial court was not guided by fixed principles of law, but on the contrary, was contrary to fixed principles of law, and the court had no right under the guise of judicial discretion to deny to this petitioner the right to have her counsel argue this case after opposing counsel who represented the plaintiff in the trial court had made a full and complete argument. This was a right she had under fixed principles of law and it could not, as we view it, be taken from her under the guise or statement of judicial discretion. The same is true as we view it with reference to plaintiff J. D. Shelton crying and weeping on the witness stand when his own lawyer asked him a simple question of looking at a picture of an automobile and his wife Venera Shelton crying in the presence of the jury at the same time. This is a terrible atmosphere to be forced to try a case in. It certainly turns a courtroom into a crying match and the administration of justice into a sympathy contest rather than trying a case under fixed principles of law and fixed principles of conduct. To brush it off on the ground of "judicial discretion" is too much we think, and is too harmful to our conception in America of justice, trials and courts.

CONCLUSION

We feel the record completely and fully substantiates every question presented herein.

We feel that to begin with, the court did not instruct the jury correctly or fully. We feel that the court did not

have the right to refuse the requested instructions which fully presented the petitioner's theory of her defense in the trial court. We feel that the trial was not conducted in accordance with the legal standards and the usual and ordinary way trials are conducted. This is probably, we think, one of the most unusual cases that will be filed in this Court as it presents unusual questions. Seldom will this Court have a case where not one plaintiff but two plaintiffs are crying at the same time in the presence of the jury and the lawyer for the defendant begging for a mistrial. Seldom will this Court have a case where 24 requested instructions are presented by the defendant and possibly one actually given. Seldom will this Court have a case where the trial judge will tell the jury that the plaintiff has a right to assume that all persons using the highway will use the same in a reasonable and careful manner and when a defendant requests an instruction presenting the same question on her behalf, the same is refused. Seldom will this Court have a case where the defendant requests the court to instruct the jury as to what a legal term means, as in this case "assured clear distance ahead", and the court refused to even tell the jury what that term means and leaves it up to the 12 jurors, men and women, to give and fix any standard they desire to fix as to what assured clear distance ahead means, and we say most sincerely that if a trial court can do this, then the trial court can refuse to define negligence, the trial court can refuse to define proximate cause, the court can refuse to define any term defined in the law books and leave it up to the jury to define these terms any way they see fit and thus actually destroy the administration of justice.

We think in this case this Court should exercise its supervisory control and issue a Writ of Certiorari, examine this case carefully and hear it fully and reverse this cause for a new trial in order that substantial justice may be done and in order that there may be no question as to the proper procedure in trials of this kind.

May we reiterate for emphasis sake only, that we have the highest regard for the trial court, the Circuit Court of Appeals and this Court, and nothing we have said in this brief is intended as a reflection on any of the courts, but we do hope the Court will consider the sincerity of counsel and petitioner in that there is only left to this petitioner her plea and appeal herein for relief from which we feel is absolutely an erroneous and illegal judgment.

We therefore request the Court to take jurisdiction, grant certiorari and grant relief herein.

Most respectfully submitted,

JOHN B. OGDEN,
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JOSH LEE,
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Oklahoma City, Oklahoma;

R. A. HOWARD,
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Ardmore, Oklahoma,

Attorneys for Petitioner.

By John B. Ogden
JOHN B. OGDEN

January, 1958.

CERTIFICATE OF MAILING

I certify that I mailed a true and correct copy of this Petition for a Writ of Certiorari to Howard S. Smith, Pulley Building, Sulphur Srpings, Texas, and to R. M. Mountcastle, Barnes Building, Muskogee, Oklahoma, attorneys for respondents, on this the 23rd day of January, 1958, by depositing the same in the United States Mail with sufficient postage affixed thereon.

John B. Ogden

JOHN B. OGDEN

CERTIFICATE

I, John B. Ogden, one of the attorneys for the petitioner, certify that the Petition for a Writ of Certiorari is filed and presented in good faith and not for the purpose of delay, but in order that substantial justice may be done.

Dated this the 23rd day of January, 1958.

John B. Ogden

JOHN B. OGDEN

APPENDIX

APPENDIX "A"

"FILED

"United States Court of Appeals
"Tenth Circuit

"Nov 7 1957

"Robert B. Cartwright
Clerk

"UNITED STATES COURT OF APPEALS
"TENTH CIRCUIT

"September Term, 1957

"MINNIE FRANKLIN, Appellant,	)	
vs.	)	Number 5579
"J. D. SHELTON and wife, VENZRA SHELTON, suing herein in their own behalf; and PAMELA SHELTON, LARRY SHELTON, ANITA SHELTON, and ROBERT SHELTON, minors, suing herein by and through J. D. SHELTON, as their next friend, Appellees	)	

"APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

"John B. Ogden and Josh Lee (R. H. Howard was with them on the brief) for Appellant;

"R. M. Mountcastle and Howard S. Smith for Appellees.

"Before BRATTON, Chief Judge, and HUXMAN and BREITENSTEIN, United States Circuit Judges.

"HUXMAN, Circuit Judge.

"This is an appeal from a judgment based on a verdict awarding substantial damages to the plaintiffs, J. D. and Venera Shelton, and to their minor children, Pamela, Larry, Anita and Robert Shelton, through their next friend, J. D. Shelton, for injuries suffered by them as the result of an automobile accident on Highway 77 south of Ardmore, Oklahoma.

"At the time of the accident, the Shelton car was going north and the Franklin car was going south. In order to reach a business establishment located east of the highway, the Franklin car turned left at a place other than a road intersection, crossing the east side of the highway in the path of the Shelton car. The Shelton car crashed into the side of the Franklin car resulting in personal injuries to all parties and inflicting damages to both vehicles. Suit was brought by the plaintiffs for personal and property damages alleging the negligence of defendant as the sole proximate cause of the accident. The defendant answered denying the allegations of negligence and filed a cross-complaint seeking personal and property damages resulting from the alleged negligence of plaintiffs, J. D. and Venera Shelton.

"Trial was had to a jury which found that the negligence of defendant was the sole proximate cause of the accident and assessed damages thus: J. D. Shelton, $53,181.00; Venera Shelton, $6,125.00; Larry Shelton, $20,375.00; Robert Shelton, $2,750.00; Pamela Shelton, $400.00; and Anita Shelton, $400.00. Judgment was entered upon the verdict and defendant appealed.

"Error is predicated upon the action of the Court in denying a motion to strike parties plaintiff because of misjoinder, that the questions of law and fact were not common to all of the plaintiffs; and that it was prejudicial to the rights of the defendant to permit all of the parties to proceed in the same action. The essence of the motion was that the defense of contributory negligence applied as to the driver, J. D. Shelton, and his wife, Venera Shelton, but did not apply as to the minor children. Rule 20(a), Federal Rules of Civil Procedure, in part provides, 'All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action.' Clearly the question of negligence on the part of the defendant in the operation of her automobile as the proximate cause of the accident and the resulting injuries to all of the plaintiffs was a question of fact common to all of the plaintiffs. Therefore, they were authorized by the rule to join in a single action for the recovery of damages. Trial courts have a wide discretion as to joinder of parties and to consolidation of cases for trial.[1] The trial Court did not abuse its discretion in conducting a single trial for the adjudication of the rights of all of the parties.

"In a motion for a more definite statement, the defendant sought to require the plaintiffs to further itemize their medical expenses. Rule 12(e), Federal Rules of Civil Procedure, provides, 'If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be re-

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[1] *Gillette Motor Transport, Inc.* v. *Northern Oklahoma Butane Co.* (10th Cir.) 179 F 2d 711.
Rankin v. *Shayne Bros., Inc.* (DC 1956) 234 F 2d 35.

quired to frame a responsive pleading, he may move for a more definite statement * * *.' Without elaborating, it can be stated that plaintiffs' complaint alleged negligence and the damages sustained by the alleged negligence sufficiently to allow defendant to file a responsive answer. Under such circumstances, any further particulars which defendant might have needed in order to prepare for trial should have been obtained by the discovery procedures. It was not an abuse of discretion to deny defendant's motion.

"Complaint is made that the Court erroneously struck from defendant's answer the allegations contained therein with reference to the joint ownership of the automobile in which plaintiffs were riding. The pleadings indicated that plaintiffs were residents of Texas and the contention is that under the community property laws of Texas it is presumed that J. D. and Venera Shelton were joint owners of the automobile in which they were riding at the time of the accident, that the money used by them on the trip was community money jointly acquired and that the trip was a joint mission of pleasure for themselves and their family. The intended purpose of the allegation was to invoke the law of Texas as the basis for imputing to plaintiff, Venera Shelton, negligence on the part of her husband in the operation of plaintiffs' automobile. But since the accident and the resulting injuries occurred in Oklahoma, the question of imputed negligence was to be determined by the law of that state. Under the law of Oklahoma, the fact that plaintiffs, J. D. Shelton and Venera Shelton, were husband and wife and the fact that they were on a mission for the mutual benefit of both is not sufficient by itself to impute to her negligence on the part of her husband in

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[2] *W. W. Clyde and Company* v. *Dyess* (10th Cir. 1942) 126 F.2d 719

the operation of the motor vehicle in which she was riding and he was driving.[3]

"So also must fall appellant's argument that Venera Shelton was negligent, as the co-owner of the automobile, in failing to exercise her duty to prevent her husband from operating the auto in a dangerous, reckless manner in violation of the law.[4] There was no showing that J. D. Shelton engaged in illegal or reckless acts which would call forth the duty on the part of Venera Shelton to control her husband's driving. In any event the matter was put to rest by the jury's finding that the sole proximate cause of the accident was defendant's negligence.

"It is further contended that the Court erred in striking from defendant's answer the allegations therein with respect to the common custom and usage of the highway at the point where the accident occurred, and rejecting evidence relating to that matter. In her answer defendant pleaded at length that there was a business and residential section along the highway in the vicinity of the point at which the accident occurred; that it had become the common practice, usage and custom to use the area as a business section and that automobiles were continuously driven across the highway in the area. It is the law in Oklahoma that the statutes of the State relating to the use of public highways are controlling over customs and usages which are repugnant to the statutory regulations.[5]

"The instructions of the trial Court adequately advised the jury as to the applicable Oklahoma statutes, irregardless of what custom and usage existed. The statutes of Oklahoma as regards the operation of a

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[3] *Hasty* v. *Pittsburg County Railway Co.* (Okla.) 240 Pac. 1056.
[4] See *Fixico* v. *Ellis* (Okla.) 46 P.2d 519.
[5] *Smith* v. *Cox* (Okla.) 361 P.2d 649.

motor vehicle as given by the Court in its instructions would be determinative of the standard of duty imposed upon the defendant. The instructions also covered the duty of plaintiff to operate his vehicle in accordance with the existing conditions of the highway at the point of the accident and the immediate surroundings. The Court did not err in this respect.

"Appellants contend that the trial Court erred in admitting certain testimony of Venera Shelton as related to physical injuries and suffering of herself and others of the Shelton family. It is argued that Mrs. Shelton was allowed to give medical testimony which should have come from a medical expert. In part she testified that her husband was a barber; that some time prior to the accident he had a tooth extracted from which some difficulty stemmed requiring a doctor's attention, and that he had been able to resume work after the difficulty cleared up. She also testified that her husband had done little work since the accident. She further testified as to the scars, bumps and obvious physical impairments suffered by her children from the accident; that her two daughters and youngest son had been nervous and that her oldest son had been slow in school and unobservant since that time; that Anita Shelton had had two upper front teeth knocked out and her nose crushed in the accident and that as a result of her crushed nose she now had difficulty breathing; that when first placed in a car after the accident she screamed and did not want the family to drive, and that at night she had nightmares and screamed; that Robert Shelton, among other injuries, had two ribs broken and a punctured lung, that tubes were placed to make the lungs expand, and that he had a scar on his back where the tubes were placed. Concerning herself, Mrs. Shelton testified that at the time of the accident she was knocked unconscious; that she had suffered certain obvious physical injuries

which were still painful and bothersome; that the sight in her left eye was destroyed; that before the accident her eyes focused properly, and that since the accident her left eye had started crossing and losing its power to focus; that prior to the accident her menstrual periods were normal and that since the accident her menstrual periods had been irregular and abnormal and that presently she was going through the menopause.

"It is uniformly held that where injuries complained of are of such character as to require skilled and professional persons to determine the cause and extent thereof, they must be proved by the testimony of medical experts, but, that a lay witness is competent to testify concerning those physical injuries and conditions which are susceptible to observation by an ordinary person.[6] On examination of all of Venera Shelton's testimony, it appears that in only one instance did she testify to injuries, conditions and events which a lay person would not be capable of observing, or to facts not within her own knowledge. In that instance she testified that her youngest son had suffered two broken ribs and a punctured lung. To this she was not competent to testify, but testimony to this effect had already been given by a medical witness. Her testimony was merely cumulative and constituted harmless error.[7]

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[6] *United States* v. *Monger* (10 Cir.) 70 F.2d 361, 363;
Niagara Fire Ins. Co. v. *Muhle* (8 Cir.) 208 F.2d 191, 196;
Chicago and N. W. Ry. Co. v. *Green* (8 Cir.) 164 F.2d 55, 63;
Prudential Life Ins. Co. v. *Bialkowski* (4 Cir.) 85 F.2d 880, 882;
Corrigan v. *United States* (9 Cir.) 82 F.2d 306, 309;
United States v. *Woltman* (DC Cir.) 57 F.2d 418;
32 C.J.S., Evidence, § 467, pg. 107;
20 Am. Jur., Evidence, § 858, pg. 719.

[7] *St. Louis & San Francisco Railroad Co.* v. *Bateman* (Okla.) 240 Pac. 110

"It is also contended that the evidence given at the trial was insufficient to support a verdict for Vera Shelton. It is argued that there was a complete lack of medical evidence concerning the injuries sustained by Mrs. Shelton and that there was no competent evidence showing her injuries to be the proximate result of the accident. The Oklahoma Court in an unbroken line of decisions has held that where the injuries complained of are of such a nature as to require skilled and professional men to determine the cause and extent thereof that it must be established by such competent testimony that the injuries were the direct and proximate result of the defendant's negligence in order to warrant recovery.[8]

"In part Mrs. Shelton testified that since the accident one eye was crossing and losing its power to focus, and that she had been having certain female disorders. While she was competent to testify that she was suffering from these disorders, her testimony was not competent to establish that these subjective conditions were the proximate result of the accident. The conditions complained of were of a nature requiring competent medical testimony to establish their cause and their cause could not by laymen be definitely attributed to the accident, absent expert medical testimony to that effect. The trial Court erred in allowing the jury to consider the question of these injuries in arriving at its award of damages.

"It is contended that the Court erred in its instructions to the jury. Five exceptions were taken to the instructions. To one instruction the exception was

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[8] *Cushing Coca-Cola Bottling Co.* v. *Francis* (Okla.) 245 P.2d 84;
Spivey v. *Atteberry* (Okla.) 238 P.2d 8.4;
James I. Barnes Const. Co. v. *Hargrove* (Okla.) 29 P.2d 573;
Inter Ocean Oil Co. v. *Marshall* (Okla.) 26 P.2d 399;
Willet v. *Johnson* (Okla.) 76 Pac. 174.

'* * * we think it is not proper under the circumstances because we think that the testimony of the defendant shows she stopped, and didn't have to give a signal for a turn left.' To another instruction '* * * That is the one, Judge, saying that he had a right to assume that everybody, that others on the highway would use the highway lawfully in determining speed and ability to stop within the assured clear distance ahead. I don't know that that is the law, if the Court please, that he had the right to assume that.' And to another, 'It's about an emergency situation. I think that that instruction standing alone would not be proper, but if the Court would put in there that if he did anything to bring about his condition of peril, why then he couldn't, you know, he wouldn't be bound.' The fourth and fifth exceptions were, '* * * I would like to except to 8-A' and '* * * then 9 is on the same situation, Judge. I think I must protect myself on my theory about it, you know.'

"Rule 51 of the Federal Rules of Civil Procedure provides in part, 'No party may assign as error the giving or the failure to give an instruction unless he objects thereto * * * stating distinctly the matter to which he objects and the grounds to his objection.' In none of defendant's exceptions to the instructions were the matters objected to or the grounds for the objection stated sufficiently distinct to afford the trial Court an opportunity to correct errors in its instructions if such existed. The exceptions taken did not meet the requirements of the Rule of Civil Procedure and, therefore, the correctness of the instructions will not be reviewed on appeal.[2]

"Defendant filed twenty-four requests for instruc-

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[2] *Hayes* v. *United States* (10 Cir. 1956) 238 F.2d 318, and cases cited therein.

tions. The failure to give some of these instructions, especially those dealing with defendant's right to the use of the road as a reasonable and prudent person, is assigned as error. Nowhere in the record does it appear that defendant objected to the Court's failure to give its requested instructions. In the absence of such timely objection the question of the Court's refusal to give defendant's instructions will not be reviewed on appeal.[10] The instructions given by the trial Court clearly, fairly and adequately presented to the jury every essential element necessary to arrive at a just and proper verdict under the law. Its refusal to give a requested instruction is no error if the matter has been adequately and correctly covered in the instruction given.[11]

"Appellant contends that the Court erred in refusing to declare a mistrial on account of the weeping of J. D. and Venera Shelton in the presence of the jury while J. D. Shelton was being examined as a witness. At the time, J. D. Shelton was testifying to the condition in which he found his children shortly after the accident. Appellant argues that the weeping was prejudicial to defendant's position and prevented a fair trial. The matter of declaring a mistrial is one resting largely in the discretion of the trial court, and the conduct of a party in weeping or crying in the courtroom does not necessarily justify a new trial, where it does not clearly appear that such conduct improperly influenced the jury.[12] Nothing in the record indicates that the trial Judge abused his discretion in not ordering a mistrial. It must be presumed that he was in the best position

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[10] Rule 51, Federal Rules of Civil Procedure.

[11] *Thringer* v. *Barlowe* (10 Cir.) 205 F.2d 476.

[12] *Tom Reed Gold Mines Co.* v. *Joe Bord* (Ariz.) 260 Pac 191, 57 A.L.R. 55;
Aderhold v. *Stewart* (Okla.) 46 P.2d 340

to discover whether plaintiffs' conduct had such an effect upon the jury that the trial could not continue on a fair basis.

"Appellant contends that the trial Court erred in allowing attorneys for the plaintiffs to divide their time for final argument. Five minutes were used in the opening argument, limiting its scope to questions of negligence, and twenty-five minutes were used in the closing argument, limiting its scope to damages. Matters relating to final argument are largely within the discretion of the trial court.[13] Nowhere is it indicated what elements in plaintiffs' closing argument prejudiced defendant's position, or toward what new matter, if any, they did not have the opportunity to reply. The arguments of counsel are not before this Court and it is impossible to discern whether defendant was prejudiced by plaintiffs' attorneys splitting their argument, as was done. The record is silent as to any request by defendant for additional time to answer the closing argument. In the absence of some indication of prejudice to defendant's position, it must be assumed that the trial Court acted within its discretion.

"Appellant contends that the trial Court erred in not declaring a mistrial after the jury had been in session for four hours and then stated in open court that they had not arrived at a verdict on any of the points or claims of the case. It is also argued that the Court erred in allowing the jury to separate for the night and return the following day to continue their deliberations. The record indicates that the jury received the charge and retired for its deliberations at three o'clock in the afternoon. At 7:05 p.m. that evening the jury returned to the courtroom at their own request, stating

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[13] *Purington Paving Brick Co.* v. *Metropolitan Paving Co.* (8th Cir.) 4 F.2d 676, 682.

they had not reached a verdict at that time. They were then released for the night and reconvened the following day at 10:00 a.m., bringing in their verdict shortly after noon. On these facts the defendant argues that the Court abused its discretion in not declaring a mistrial. The record does not disclose any objection to the separation of the jury or to the resumption of deliberations on the following morning. Neither does the record show facts indicating an abuse of discretion by the trial Court in allowing the jury to separate and continue its deliberations the following morning. The Court acted within its discretion in refusing to declare a mistrial.

"Finally, it is argued that the verdict for plaintiff is excessive and was based upon passion, prejudice and sympathy and that the trial Court erred in refusing to set the verdict aside on defendant's moton for a new trial. This Court in *E. L. Farmer & Company* v. *Hood*, 239 F.2d 547, *certiorari denied* 353 U.S. 911, stated:

> 'It is argued that the verdict is excessive and obviously the result of passion and prejudice. The question whether a verdict is excessive and is the result of passion and prejudice is one for the trial court to determine on motion for new trial. The action of the court in granting or denying a motion for new trial on that ground is not open to review on appeal except for abuse of discretion. And ordinarily it will not be held on appeal that the trial court abused its discretion in denying a motion for a new trial on such ground unless it affirmatively appears that in respect to amount the verdict resulted from bias, prejudice, or passion.'[14]

There is nothing in the record indicating that the verdict resulted from bias, prejudice or passion. Neither

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[14] See also *Chicago, Rock Island & Pacific Railway Co.* v. *Kifer*, (10th Cir.) 216 F.2d 753."

can it be said that the verdict was excessive considering the evidence of damages shown during the trial. The Court did not abuse its discretion in denying defendant's motion for a new trial.

"The judgment for Venera Shelton is REVERSED and as to her the case is remanded for a new trial; in all other respects the judgment of the trial Court is AFFIRMED. Costs are assessed one-half to appellant and one-half to appellees.

APPENDIX "B"

"CHARGE TO THE JURY

"The Court: As mentioned earlier, the plaintiffs bring this action to recover for injuries and damages suffered from a collision between plaintiffs' station wagon and a car being driven by the defendant. The accident occurred just south of the city limits of Ardmore, Oklahoma, on Highway No. 77. Plaintiff J. D. Shelton, husband of plaintiff Venera Shelton, and father of Larry, Robert, Pamela and Anita, minors, was driving the station wagon at the time of the accident.

"Plaintiffs urge that the instant collision was caused by the defendant's negligence in suddenly cutting across in front of plaintiffs' vehicle granting plaintiff, Mr. Shelton, no opportunity to avoid an impact. Plaintiffs specifically assert that the defendant, Mrs. Franklin, was negligent in failing to keep a proper lookout, in operating her car at a dangerous rate of speed considering the existing circumstances, and in failing to yield the right-of-way to plaintiffs' car.

"The defendant denies that she was in any way guilty of carelessness and asserts that the driver of plaintiffs' station-wagon was negligent in driving at an excessive speed; in failing to keep a proper lookout; in failing to keep his car under control so as to be able to 'stop within the assured clear distance ahead'; in failing to yield the right-of-way to the defendant; in failing to have the brakes of his vehicle in proper working order; and, in failing generally to exercise ordinary care.

"In addition, the defendant urges that plaintiffs Mr. and Mrs. Shelton were on a joint journey so as to make the negligence of Mr. Shelton imputable to Mrs. Shelton. And, further asserts that Mrs. Shelton was her-

self guilty of carelessness in not taking that care for herself a reasonably prudent passenger would have; and, specifically alleges, that Mrs. Shelton should have warned Mr. Shelton of the approaching danger and admonished him not to drive in a negligent manner.

"By way of counter-claim the defendant asks to recover for personal injuries she received from this accident.

"It is my duty, as judge, to instruct you on the law; it is then your duty as jurors, to apply the law to the facts which you find exist from the evidence introduced.

"The allegations of the parties are not evidence, in any respect; they merely define the issues to be tried and do not raise the slightest presumption as to the true facts in the case. The introduced evidence must be your sole guide in arriving at the actual facts in this case.

"Each party to this action has the burden of proving his or her affirmative allegations by a fair preponderance of the evidence. A 'fair preponderance' of the evidence is that proof which satisfies your minds as to its truth when weighed against the opposing evidence; it does not mean, necessarily, the greater number of witnesses.

"Thus, for the plaintiffs to recover from the defendant they must establish by this just mentioned measure of proof, that the defendant was negligent, and that her negligence was the 'proximate cause' of the complained of collision.

"And, if the plaintiffs make such proof, in order to then prevent Mr. or Mrs. Shelton from recovering verdicts against her, the defendant, Mrs. Franklin, must establish by a fair preponderance of the evidence that Mr. or Mrs. Shelton were guilty of 'contributory negligence.'

"For Mrs. Franklin to recover on her counter-claim, she must establish by a fair preponderance of the evidence that the plaintiff, Mr. Shelton, was guilty of negligence which was the proximate cause of this accident.

"'Proximate cause', as used in these instructions, means the cause which in natural and continuous sequence, without the intervention of any other cause, produced the injury, and without which the result would not have happened. For an action of negligence to be deemed the 'proximate cause' of an injury, the injury sustained must be such as could have reasonably been foreseen by an ordinarily prudent person.

"'Contributory negligence' may be defined as 'an act or omission by the one seeking to recover, amounting to a lack of ordinary care and prudence, which co-operating or concurring with the negligence of the one sued, becomes the proximate cause of the complained of injury.' A proper consideration is whether or not the person and persons seeking to recover damages took the precaution for his or her own safety that an ordinarily prudent person would have under like conditions.

"You are advised that the Oklahoma Law provides in part:

"1. 'Any person driving a vehicle on a highway shall drive the same at a careful and prudent speed not greater than, nor less than is reasonable and proper, having due regard to the traffic, surface and width of the highway and of any other conditions then existing * * *.'

"2. 'No person * * * shall turn a vehicle to enter a private road or driveway, or otherwise turn a vehicle from a direct course, or move right or left upon a roadway, unless and until such movement can be made

with reasonable safety. No person shall turn any vehicle without giving an appropriate signal in the manner hereinafter provided. (1) A signal of intention to turn right or left, slow or stop, when required, shall be given continuously during not less than the last one hundred feet traveled by the vehicle before turning, or stopping. For turning left the hand and arm are to be extended horizontally.'

"3. 'No person shall start a vehicle which is stopped, standing, or parked, unless and until such movement can be made with reasonable safety.'

"4. 'All vehicle operators must keep a proper lookout and at all times exercise that degree of care that a reasonably prudent person would under similar conditions.'

"Therefore, if you find by a fair preponderance of the evidence that the defendant (1) was not driving 'at a careful and prudent speed' in view of the existing conditions; or, (2) turned her vehicle from a direct course when such movement could not be made with reasonable safety, or, turned left without giving the required signal 'not less than the last one hundred feet traveled by the vehicle before turning, or stopping', or (3) started her vehicle from a standing position when such movement could not be made with reasonable safety; or, (4) failed to keep a proper lookout or otherwise fail to exercise ordinary care under the existing circumstances, any such failure or failures would constitute negligence on her part, and if such negligence was the sole proximate cause of the complained of accident, then your verdict should be in favor of all the plaintiffs.

"You are further instructed that Oklahoma Law requires that '* * * no person shall drive any vehicle upon a highway at a speed greater than will permit

him to bring it to a stop within the assured clear distance ahead;'

"Therefore, should find by a fair preponderance of the evidence that Plaintiff, J. D. Shelton:

"(1) was driving at a speed which was greater than was reasonable and proper under the existing conditions; or, (2) failed to keep a proper lookout; or, (3) failed to keep his car under control so as to be able to 'stop within the assured clear distance ahead'; or, (4) failed in any way to exercise ordinary care and prudence in his driving, any such failure or failures would constitute negligence on the part of Mr. Shelton, and if such negligence was the sole proximate cause of this accident you should find for the defendant, Mrs. Franklin, on her counter-claim.

"However, you are further advised that in connection with Mr. Shelton's duty to drive so as to be able to stop within the assured clear distance ahead, such does not mean that he had an absolute duty to drive in such a manner as to be able to stop and avoid any type of impact under any condition. Whether the plaintiff, Mr. Shelton, was driving so as to be able to stop within the assured clear distance ahead must be determined by you as a matter of fact from all the evidence; and, in this regard you are entitled to consider another applicable law which gives a driver, such as Mr. Shelton, the right to assume that others will use the highways lawfully, in determining his speed and ability to stop within the assured clear distance ahead.

"You are instructed that where the driver of an automobile, without any fault on his part, is placed in a position of imminent peril by another vehicle, the law will not hold him guilty of such negligence as to defeat his recovery for injuries received in an ensuing collision because he does not select the very wisest course, and an honest mistake of judgment in such a

sudden emergency will not of itself constitute contributory negligence, although another course might have been better and safer. The proper test is whether or not such driver exercised that judgment which a reasonably prudent person would have where no time for deliberate judgment existed because of the sudden emergency.

"You are further advised that the mere existence of the marital relation between husband and wife does not impute a husband's negligence, if any, to a wife seeking recovery for her injuries.

"In this connection you are instructed that there is no evidence that Mrs. Shelton shared with Mr. Shelton an equal right to direct and control the movements and conduct of each other, with a voice or right to be heard in the control and management of the automobile, and consequently, the court hereby rules as a matter of law, that the negligence, if any, of Mr. Shelton, is not imputable to Mrs. Shelton, as to her claim.

"As just mentioned it is a general rule that the negligence, if any, of the driver of any automobile is not imputable to the passengers in the car, where such passengers have no right of control over the management and operation of the car; but the question of whether or not such passengers were negligent and whether their negligence contributed to the collision and resulting injuries must be determined by you according to all of the facts and circumstances as disclosed by the evidence. Naturally, the four minor children, plaintiffs in this action, cannot be charged with negligence, under the introduced evidence. However, as to Mrs. Shelton, if you find that from the evidence that she at any time while in a place of safety realized, or by the exercise of ordinary care should have realized, that the automobile in which they were riding was approaching impending danger, or, that the

driver of the station-wagon was not using due caution and care for the safety of himself and his passengers, then it became the duty of Mrs. Shelton to warn her husband of such impending danger or admonish against the careless driving or to exercise such means to avoid injury that an ordinarily prudent person would have under similar circumstances, and her failure so to do would be 'contributory negligence', and she could not recover for her injuries. Naturally, if Mr. Shelton was in no way negligent, Mrs. Shelton could not be guilty of 'contributory negligence.'

"You are further instructed that the law recognizes what is termed as an 'unavoidable accident or casualty', that is an accident which occurs in which no one is guilty of negligence.

"Naturally, if you find that in the instant accident neither the plaintiff, Mr. Shelton, nor the defendant, Mrs. Franklin, were guilty of negligence, but that this accident was 'unavoidable', then none of the suing parties can recover.

"Thus, in resumé, you are instructed:

"1. If the defendant's negligence caused this collision, you should find in favor of all six plaintiffs.

"2. If Mr. Shelton's negligence caused this accident, you should find for the defendant on her counter-claim.

"3. If the negligence of the defendant, Mrs. Franklin, and of the plaintiff, Mr. Shelton, combined to cause this accident, neither Mrs. Franklin nor Mr. Shelton can recover damages. However, the four minor children would be entitled to verdicts against the defendant. And, if Mrs. Shelton were not herself guilty of 'contributory negligence' she would be entitled to recover from the defendant. However, if Mrs. Shelton was guilty of 'contributory negligence' she cannot recover.

"4. If this accident was 'unavoidable', you should find in favor of the defendant on plaintiffs' complaint and, in favor of the plaintiff on defendant's counterclaim.

"Should you find for the plaintiff, J. D. Shelton, you should award him such an amount as will fairly and justly compensate him for the injuries which you find directly and proximately flowed from the negligence of the defendant. This must not exceed $112,190.00, the sum sued for. In determining the amount to be granted Mr. Shelton, if any, you may consider the physical and mental pain and suffering endured up to this time and that which may reasonably be expected in the future—the loss of earning power, both past and future, and medical and hospital expenses both past and that reasonably to be expected in the future, if any.

"Should you find for the plaintiff Venera Shelton, you should grant her that amount which will fairly and justly compensate her for the injuries she received in this accident, not to exceed the sued for sum of $31,429.00. In determining the amount of Mrs. Shelton's award, if any, you may consider the physical and mental pain and suffering endured up to this time and that which may reasonably be expected in the future, loss of earning power, both past and future, if any, and medical and hospital expenses both past and that reasonably to be expected in the future, if any.

"Should you find for the four minor plaintiffs in this action you should award each of them that amount which you deem will fairly and justly compensate each of them for the pecuniary loss each has suffered because of this accident. However, the amounts of these awards must not exceed the sued for sums, which are: (1) For Larry Shelton, $53,500.00; (2) For Robert Shelton, $10,380.00; (3) For Pamela Shelton, $5,000.00; and (4) For Anita Shelton, $5,000.00.

"In determining the amount of these awards you may consider the physical and mental suffering which each has undergone in the past, and reasonably will in the future, because of their injuries; the pecuniary loss each will in all probability suffer after reaching the age of 21 years, if any, because of these injuries; and, the reasonable and necessary costs of hospital services and the services of physicians from and after the date of this accident.

"Should you find for the defendant, Mrs. Franklin, on her counter-claim you should award her such a sum as will fairly and adequately compensate her for the injuries she received because of Mr. Shelton's negligence, if any. However, this award must not exceed the requested sum of $105,973.50.

"In determining the amount of her award, if any, you may consider the mental and physical pain and suffering, past and future, arising from this accident—her loss of earning power, past and future, if any, and medical and hospital expenses, both past and future, arising out of this accident.

"Testimony has been given by men termed by the law—'expert witnesses.' Although the law recognizes and receives the testimony of men whose opinions are based on knowledge gained through study and experience in a specific field, the ultimate weight to be given their testimony is to be determined by you. You are not required to surrender your own judgment to that of any person testifying as an expert witness. However, the testimony of an expert, like any other witness, is to be given such weight as you think proper when you determine the facts in this case.

"You are the sole judges of the facts and of the credibility of the testifying witnesses. In weighing and evaluating the testimony of the witnesses you may consider their demeanor on the witness stand, their in-

terest, if any, in the results of the case, their bias and prejudice or fairness and candor, the probability or improbability of their statements, their character, and all other facts in evidence before you.

"Where possible you should reconcile all the testimony. However, where there is a direct conflict, you should carefully use the standards just mentioned in determining who is stating the truth. The truth is not necessarily with the majority of the witnesses. You may choose to believe one rather than a great number, although the number may be considered along with the other circumstances.

"If you find any witnesses have wilfully testified falsely to a material fact, you may disregard the whole or any part of their testimony which you deem unreliable.

"Your verdict must be based on facts disclosed by the evidence. Certainly, mere speculation or prejudice brought about by sympathy should not enter in.

"Each of you should decide the case yourself, but you should do this only after a careful consideration of the case with your fellow jurors. Although you should not surrender your honest convictions concerning the effect or weight of evidence for the mere purpose of returning a verdict or solely because of the opinion of other jurors, you should not hesitate to change your opinion when convinced it is in error. An agreement should be reached if you can do so without doing violence to your individual judgment.

"It will take the concurrence of all twelve of you to return a verdict in this case. After you retire, select one of your members as foreman to preside over your deliberations. When your verdict is reached the foreman alone need sign it.

"Ladies and gentlemen, you will notice that five alternative verdicts have been handed you. From these five you will select one to return as your verdict.

"(Both sides waive swearing of the bailiff and the jury withdraws.)

"(Jury recalled immediately upon leaving the court room and the following instructions given:)

"Ladies and gentlemen of the jury, the Court calls attention to the fact that if you find for the plaintiff, Shelton, and the family, the medical expenses amounted to, it has been stipulated, $2,715.00; and if you find for the plaintiff, Shelton, it is stipulated that the damage to his Nash was $600.00.

"Also, the Court calls attention to the fact that in this zone where he was traveling, the speed allowed by law by the State of Oklahoma was 65 miles per hour, but you have to take into consideration the other instructions that the Court has given you with regard to the conditions, circumstances, prevailing at that particular time. It doesn't mean that a man can drive 65 miles per hour in any zone, but that was the speed limit at that time in the daytime, in Oklahoma.

"All right, you may go to your jury room."

APPENDIX "C"

"1. Ladies and gentlemen of the jury you are instructed that the term negligence as used throughout these instructions means the doing of some act which a reasonably prudent person under the same or similar circumstances would not do or the failure to do some act which a reasonably prudent person would do under the same or similar circumstances.

"Given: In substance, W. R. Wallace, District Judge.

"2. You are instructed further that in the operation of an automobile upon the highways of the State of Oklahoma, all persons are required to operate the same in a reasonable and prudent manner having due regard for the traffic upon the highway, the condition of the highway, and that while the speed of an automobile, commonly referred to as a 'speed limit', is fixed by Statute, nevertheless if at a given point or place on the highway on account of the traffic or the use made of the highway such maximum speed would be unreasonable, such person or any person is not authorized to drive at such maximum speed, and you are to determine what would be and what is a reasonable speed considering all of the facts and all of the circumstances at any given point or any given time or any given place, and all persons are required to operate their vehicles under the circumstances at a reasonable speed, and in any event not to exceed the speed fixed by Statute at such point.

"Given: In substance, W. R. Wallace, District Judge.

"3. If a highway at a given point is congested in traffic or used as a business district or used for the purpose of crossing or re-crossing, then the speed should be commensurate therewith, and a car should not be driven at such a speed as would endanger the lives of the occupants of the car or other cars or pe-

destrians using said highway in the manner reasonably anticipated or which should be reasonably anticipated by all of the facts and circumstances surrounding and attending said highway at such place and at such time.

"Refused: W. R. Wallace, District Judge.

"4. You are further instructed ladies and gentlemen of the jury, that no one has exclusive use of the highway. The public highways of this State are for the use and benefit of all those desiring to use said highways and all are required to use them in a reasonable and prudent manner considering all the facts and circumstances shown, and a failure to operate an automobile in a reasonable and prudent manner is negligence under the laws of this State.

"Given: In substance—W. R. Wallace, District Judge.

"5. You are further instructed ladies and gentlemen of the jury, that any person driving an automobile on the highways of this State is required under the law to drive said automobile in such a manner that he or she can stop said automobile within the assured clear distance ahead and you are instructed that it is negligence to operate an automobile in such a manner or at such a speed that the same cannot be stopped by the operator thereof within the assured clear distance ahead, and if you find that the plaintiff herein failed to operate his automobile so that he could stop the same within the assured clear distance ahead and that such negligence upon his part either brought about the accident or contributed thereto, then and in that event the plaintiff cannot recover herein and your verdict must be for the defendant.

"Given: In substance—W. R. Wallace, District Judge.

"6. By the term assured clear distance ahead, you are instructed that this term means that a person must operate an automobile on the public highway so that he can stop his car within the unobstructed range of his vision and if there are obstructions upon the highway he must operate his car so that he can stop the same before coming in contact with such obstruction whether it be an automobile or a pedestrian. Assured clear distance simply means the distance which is assured without any obstruction thereon, and if an obstruction is upon the highway then the driver of an automobile must have his car under such control that he can stop it before colliding with such object.

"Given: In substance—W. R. Wallace, District Judge.

"7. You are further instructed ladies and gentlemen of the jury, that a person driving upon the highway and approaching a hill over which he or she cannot see, must keep such car under control so that he or she can stop the same within the range of his vision and he or she does not have the right to assume that the highway will be clear beyond his or her vision.

"Refused: W. R. Wallace, District Judge.

"8. You are therefore instructed that if you find that in this case the plaintiff was approaching the crest of the hill coming from the south and traveling north and that he could not see over said hill when approaching the same, then he was required to approach the same in such a manner that he could stop his automobile when he arrived at the top of such hill or at a point on said hill where he could see beyond said hill and determine whether or not there was traffic on said highway or approaching said highway and be able to stop the same without injury to any person or persons or vehicles that might be on said highway or crossing the same.

"Refused: W. R. Wallace, District Judge.

"9. Ladies and gentlemen, you are further instructed that it was the duty of the plaintiff in this case to take into consideration in driving his automobile the nature of the surroundings on said highway at the point where the accident complained of occurred. That is, he should take into consideration whether or not there were buildings, whether or not there were businesses operated on said highway and whether or not people would likely be crossing said highway from either the east or the west or turning off of said highway, and he should take into consideration the nature of the highway, whether it was maintained to permit traffic to cross and re-cross, and drive his car taking all of these matters into consideration in a reasonable and prudent manner and anticipate the ordinary and reasonable use of said highway in said regard and whether people would or would not be crossing said highway and whether or not there would likely be traffic thereon considering the use thereof made and the surroundings at such place.

"Refused: W. R. Wallace, District Judge.

"10. You are further instructed that it was the duty of the plaintiff in this case to have his car properly equipped with brakes so that he could stop the same within a reasonable distance considering the size and weight of the car and the condition of the road.

"Refused: W. R. Wallace, District Judge.

"11. You are instructed, ladies and gentlemen of the jury, that the law requiring meeting vehicles to turn to the right does not apply to vehicles crossing from one side of the road to another, and one desiring to stop at premises on the left side of the road may cross over to that side without violating the law. In such cases the driver who desires to cross over must like all other drivers use due care; that is he or she must exercise reasonable care and caution in cross-

ing the highway, but nevertheless, any person has the right to cross any highway provided he or she uses due care in so doing. In determining whether any person is guilty of negligence in crossing a highway or driving a car upon the highway you should use as your guide in determining such matter whether or not an ordinary, reasonable prudent person under the same or similar circumstances would so drive his car across the highway or would drive his or her car in the manner which you find from the evidence either of the parties drove their cars at the time and place in question.

"Given: In substance—W R. Wallace, District Judge.

"12. You are instructed that the duty to drive an automobile on the highways imposed on the plaintiff and defendant mutual and reciprocal obligations and that both were required to operate their cars as a reasonable and prudent person would operate the same under the same or similar circumstances.

"Given: In substance—W. R. Wallace, District Judge.

"13. You are further instructed in this case ladies and gentlemen, that if you find that the plaintiff was guilty of negligence in any manner in the operation of his car and that such negligence contributed to the accident and injuries complained of, then your verdict must be for the defendant although you may find that the defendant was likewise guilty of negligence which contributed to the accident or injuries complained of. In other words, you are instructed that if both parties were guilty of negligence and the combined negligence of both parties brought about the accident, then neither of said parties are entitled to recover from the other and your verdict must simply read: 'We, the jury,

find for the defendant.' which simply means that neither party can recover from the other.

"Given: Covered, W. R. Wallace, District Judge.

"14. You are further instructed ladies and gentlemen of the jury, that in this case if you should find that the accident and injuries complained of were brought about without fault of either party, then the same would be called and termed an unavoidable accident and neither party would be entitled to recover and your verdict must be: 'We, the jury, find for the defendant.'

"Given: W. R. Wallace, District Judge.

"15. Ladies and gentlemen of the jury, you are further instructed in this case that the evidence shows and it is admitted that the plaintiff J. D. Shelton and his wife Venera Shelton owned the automobile in which they were riding jointly and that said plaintiff husband and wife were on a joint mission for their own pleasure and benefit and for that of their family and therefore, the negligence of one was imputable to the other, and both had a duty to either drive said car in a reasonable and prudent manner and keep a proper lookout on the highway for their own safety and the safety of others, and that a failure upon the part of the plaintiff J. D. Shelton to so operate said car in a prudent manner was imputable to his wife Venera Shelton, and that Venera Shelton had a duty to keep a lookout on said highway and to advise her husband of any approaching danger and to warn him of any attending danger on said highway and if she failed to so do, her negligence in this regard is imputable to the plaintiff J. D. Shelton, and if you find that her acts in failing to keep a proper lookout and warn the plaintiff of any approaching danger contributed to or brought about the accident between plaintiffs' car and defendant's car, then and in that event you are in-

structed that your verdict should be for the defendant herein.

"Refused: W. R. Wallace, District Judge.

"16. You are instructed that in the use of a highway in the operating of automobiles thereon, a person may cross the highway or turn to the left across said highway if there is no traffic or automobile in view close enough to constitute an immediate hazard. In other words, a person is not required to wait until the highway is completely cleared in all directions but may cross a highway when there appears to be no car so close as to constitute an immediate hazard, and in this regard you are further instructed that the defendant Mrs. Minnie Franklin had a right to assume that persons driving on said highway would drive their cars at a reasonable rate of speed under the circumstances and would keep their car or his or her car under such control that he or she could stop the same within the assured clear distance ahead.

"Given: Covered—W. R. Wallace, District Judge.

"17. You are further instructed that the defendant Mrs. Minnie Franklin had the right to cross said highway when it appeared to her after looking that there was no vehicle approaching so close as to constitute an immediate hazard, and if she looked and saw no car close enough or in view then she had the right to cross said highway at a reasonable rate of speed.

"Given: Covered—W. R. Wallace, District Judge.

"18. You are further instructed that it was the duty of the plaintiff J. D. Shelton in the operation of the automobile when he observed the automobile of the defendant on the highway to exercise reasonable care and caution to prevent striking her or hitting her car and he should have if he could have reasonably done so under the circumstances, driven his car either to the right or left or stopped said car in order to avoid

said collision, and even if you should find that the defendant Mrs. Minnie Franklin had driven her car out on said highway, nevertheless the plaintiff would not have the right to drive his car into her car regardless of who might have been at fault, but he had a duty to prevent the accident and use reasonable care and caution after he saw her car thereon and to either drive said car to the right or left or apply his brakes with such force as to stop his car if he could have reasonably done so at the time.

"Given: Covered—W. R. Wallace, District Judge.

"19. With reference to the term contributory negligence as used in these instructions, ladies and gentlemen of the jury, you are told that the term contributory negligence simply means negligence on the part of some person or persons which contributes to the accident, and consequently, any person who is guilty of contributory negligence cannot recover.

"Given: W. R. Wallace, District Judge.

"20. Ladies and gentlemen of the jury, you are instructed that evidence has been offered in this case showing or tending to show or for the purpose of showing that on the east side of the highway at or about the point where the collision occurred there were business establishments consisting of cafes, filling stations and other businesses, and that on either side of the paved portion of the highway there was a space leveled and graveled or improved by the Highway Department of the State of Oklahoma for the purpose of affording traffic a place to cross said highway from either the west or the east, and that it was the custom of the public generally to cross said highway from east to west at said point and from west to east, and that it was apparent from one driving on said highway that such use was made of the highway and that such crossing was a common custom or usage, and if you find

from the evidence this to be true, then you are instructed that the defendant in this case, Mrs. Minnie Franklin, had the right to cross said highway provided she used reasonable care and caution in so doing, and that if she exercised the same care and caution in crossing said highway as is or was used by an ordinary, reasonable and prudent person, then you are instructed that after she entered upon said highway and crossing the same if she entered the same before the plaintiffs' automobile had come into plain view, then and in that event she had the right-of-way and it became the duty of the plaintiff to yield the right-of-way to her.

"Refused: W. R. Wallace, District Judge.

"21. Ladies and gentlemen of the jury, in determining whether Mrs. Franklin, the defendant in this case, was guilty of negligence or contributory negligence, you should determine, considering the conditions existing at the point or place of the accident, whether or not she acted as a reasonably careful and prudent person, and if you find that she did so act as a reasonably prudent person under such circumstances in the crossing of the said highway, you are instructed that she would not be guilty of negligence and that she had a right to so act and your verdict must be for the defendant Mrs. Franklin.

"Given: Covered—W. R. Wallace, District Judge.

"22. You are further instructed that under the laws of this State that if a vehicle enters upon the highway an appreciable length of time ahead of another vehicle approaching said point where said vehicle is crossing the highway, said vehicle crossing the highway would have the right-of-way since the first vehicle on said highway would have the right-of-way at said point if it entered upon said highway at said point an appreciable length of time ahead of the other automobile ap-

proaching said point regardless of what direction the other vehicle was approaching from, and you are instructed that both drivers must exercise reasonable precaution commensurate with the apparent dangers incident to driving upon a highway burdened with traffic to avoid injury to the person or property on such highway regardless of which vehicle has the right-of-way.

"Given: Covered—W. R. Wallace, District Judge.

"23. You are further instructed that the right of precedence as to the right-of-way does not release the vehicle thus favored from the duty of exercising due care not to injure another and that it was the duty of both plaintiff and defendant to exercise every reasonable precaution commensurate with the apparent danger incident to driving upon a highway where the accident occurred which was burdened with traffic regardless of which of the vehicles had the right-of-way.

"Given: Covered—W. R. Wallace, District Judge.

"24. You are instructed that it is the duty of a driver of an automobile while driving upon a public highway to keep his automobile always under proper control so as to avoid an accident, and to drive the same at a rate of speed which is proper and sufficiently slow in the light of attending circumstances, and you are, therefore, instructed that if you find from a fair preponderance of the evidence that the plaintiff failed to observe any of the above enumerated duties and obligations of those who drive cars upon the highways, and that this failure so to do was the proximate cause of the accident or contributed thereto, and that the accident proximately produced the injuries, if any, to plaintiff, for which he is now suing, then you are instructed that your verdict should be in favor of the defendant and against the plaintiff.

"Given: Covered—W. R. Wallace, District Judge."

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SUPREME COURT, U. S.

No. 742

In the

Supreme Court of the United States

OCTOBER TERM, 1957

MINNIE FRANKLIN,

Petitioner,

v.

J. D. SHELTON and Wife, VENERA SHELTON, suing herein in their own behalf; and PAMELA SHELTON, LARRY SHELTON, ANITA SHELTON, and ROBERT SHELTON, minors, suing herein by and through J. D. SHELTON, as their next friend,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 742

In the

Supreme Court of the United States

OCTOBER TERM, 1957

MINNIE FRANKLIN,

Petitioner,

v.

J. D. SHELTON and Wife, VENERA SHELTON, suing herein in their own behalf; and PAMELA SHELTON, LARRY SHELTON, ANITA SHELTON, and ROBERT SHELTON, minors, suing herein by and through J. D. SHELTON, as their next friend,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable, Earl Warren, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

QUESTIONS PRESENTED

1. There is direct conflict between the decisions of the Court of Appeals upon questions of Federal Rules of Civil Procedure, being Rules 51 and 46.

2. Conflict of decisions of Court of Appeals in opinion with state court decisions of the Supreme Court of Oklahoma on nonfederal questions in violation of the Rule and the law as announced by the Supreme Court of the United States in *Erie R. R. v. Tompkins, 304 U. S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1188.*

3. The judgment of the District Court for the Eastern District of Oklahoma and the opinion of the Circuit Court of Appeals above quoted in this case denies to the petitioner her constitutional rights and is violative of Amendment V of the Constitution of the United States in that it denies her due process of law.

4. The trial court and the Court of Appeals denied the petitioner her constitutional rights guaranteeing her a fair and impartial trial on the ground of harmless error.

STATEMENT OF THE CASE

Being unable to concur with petitioner's Statement of the Case, we submit the following:

Respondents were the plaintiffs in the trial court and won a favorable verdict and judgment which was affirmed in the Court of Appeals, except as to one of the plaintiffs, there being a remand as to her solely on the question of her damages not being supported by expert medical testimony. Therefore, these Respondents are entitled to have the facts reviewed in a light favorable to them.

This is an automobile collision case, the accident taking place on a national highway about one-half mile outside the city limits of Ardmore, Oklahoma, on a clear day shortly after noon. Respondent Shelton was driving his station wagon, accompanied by his family as passengers, in a Northerly direction at a speed estimated by two disinterested witnesses at from 35 to 45 miles per hour (R. 53, 88) in an area where the speed limit was 65 miles per hour (R. 89). The statement is made by Petitioner in her brief that the area involved was a business district, a matter which was struck from her trial pleading on Motion by Respondents, and this point is not before this Court.

Contrary to the Statement by Petitioner the station wagon did not suddenly come over the crest of a hill. It was visible for a distance of 900 measured feet from the point where the accident occurred according to the Highway Patrolman's actual measurement (R. 88). At most there was only a silght rise in the highway at some distance from the point of impact (R. 387, 389). The collision occurred in Respondents' lane of traffic (R. 52).

Petitioner states that she drove her Cadillac to her right-hand side of the road, waited and then crossed when there was no traffic near enough to constitute an immediate hazard. Respondents' testimony was to the contrary, as well as the testimony of a disinterested bus driver who had been following the station wagon for several miles, watching its speed as well as the roadway, and this testimony showed that Petitioner slowed her car and then turned across the

highway into Shelton's lane of traffic, without giving any signal whatever, and at a time when he could not avoid her by the use of any means at hand. Taking Petitioner's statement at face value, as a matter of law, she did cross the road when there was an immediate traffic hazard, and if she did look up and down the road, she looked without seeing.

As to statements made by Petitioner with regard to the charge of the trial court, we believe the Court's Charge constitutes the best evidence that it was full and fair to all parties alike (R. 350 to 359).

Finally, petitioner's statement that respondents J. D. and Venera Shelton were crying before the jury without provocation is entirely unsubstantiated by the record, which shows that only J. D. Shelton was crying after looking at a picture of his station wagon and while telling about trying to rescue his family from the wreckage (R. 226, 228). This action certainly was not unnatural on his part in view of the permanent and serious injuries inflicted upon himself and his family by the carelessness of the defendant petitioner.

RESPONDENTS' PROPOSITIONS

1.

There is no conflict of decisions between the Courts of Appeals as to construction of Rules 51 and 46, Federal Rules of Civil Procedure as applied to the facts of the instant case.

2.

There is no conflict of decisions between the Court of Appeals and the Supreme Court of Oklahoma as to the substantive law of this case.

3.

The trial court's conduct of the case was fair in every way and petitioner was denied none of her constitutional rights (In reply to Petitioner's Questions Presented Numbers Three and Four).

PROPOSITIONS RESTATED

1.

There is no conflict of decisions between the Courts of Appeals as to construction of Rules 51 and 46, Federal Rules of Civil Procedure as applied to the facts of the instant case.

ARGUMENT

Petitioner cites one case which might be taken to be in support of her First Question Presented from the language quoted from it in the Petition (page 6). This case, *Montgomery v. Virginia Stage Lines, Inc., D. C., 191 F. 2d 770,* does show in the first part of the opioion that the court believes Rules 51 and 46 should be construed together and that probably a proposed instruction, apparently whenever presented to the trial judge, should be considered as an objection if it fairly brings to the judge's attention the

matter of which complaint is made. However, later on in the opinion the court backs away from this proposition and bases its holding on the ground that "fundamental error" was committed by the trial court not giving the particular charge, whether brought to his attention or not.

Since the decision finally hinged on "fundamental error," it is apparent there is no conflict of decision between that case and the one at hand. The Tenth Circuit Court of Appeals also applies the "fundamental error" doctrine in an applicable case. See *Smith v. Welch, 10 Cir., 189 F. 2d 832; Allen v. Nelson Dodd Produce Company, 10 Cir., 207 F. 2d 296; Kanatser v. Chrysler Corporation, 10 Cir. 199 F. 2d 610, Certiorari denied, 344 U. S. 921, 73 S. Ct. 388, 97 L. Ed. 710.*

Rule 46, Federal Rules of Civil Procedure, modifies the previous practice requiring formal exceptions to rulings or orders of the court but we emphasize this particular rule REQUIRES "that a party at the time the ruling or order of the court is made or sought, make known to the court, the action which he desires the court to take or his objection to the action taken and his grounds therefore."

The sequence of action in this particular case in the trial court is shown by the record; it reflects that the jury had retired before any objections were made by petitioner's attorney to the charge, and before the proposed instructions were submitted to the trial judge. Also, it further appears from examination of the record that petitioner's attorney

made no exception or objection to the failure of the trial judge to charge as requested by him at such time as the instructions were refused. (R. 375 to 384.) It therefore conclusively appears that the requirements of Rule 46 were not met in any particular, thus laying to rest any argument as to whether or not petitioner's attorney had properly brought his complaints to the trial court's attention.

Among the cases cited by petitioner in support of her First Proposition are *Wright v. Farm Journal, Inc., 2 Cir., 158 F. 2d 976* and *Williams v. Powers, 6 Cir., 135 F. 2d 153*. In the *Wright* case, although the court says that Rules 51 and 46 should be construed together, it further appears that the particular instruction was presented at the proper time, that is, before the jury retired. The *Williams* case powerfully supports respondents' position instead of petitioner's, as the court says *(135 F. 2d 157)*:

> "The record shows that appellant requested charges but the record is barren of any objection or exception appellant made to the court to charge as requested. Under the express provisions of Rule 51 of the Rules of Procedure, supra, appellant is prohibited from urging the error, if any. Reeve Bros. v. Guest, 5 Cir., 131 F. 2d 710."

The Court of Appeals for the Tenth Circuit has decided the same question now presented many times, and presumably on one occasion the same question from the same court has been ruled on by the Supreme Court of the United States. This case held that if exceptions to the charge were made after the jury retired, they could not be considered

and the failure to present in time concluded the matter. See *Kanatser v. Chrysler Corporation, 10 Cir., 199 F. 2d 610, Certiorari denied, 344 U. S. 921, 73 S. Ct. 388, 97 L. Ed. 710.*

With the action taken by this Court on the last cited case, plus a long line of authority establishing the same principle by the same Tenth Circuit Court of Appeals, it appears litigants would feel safe in following the same procedure. See *Hayes v. United States, 10 Cir., 238 F. 2d 318; Allen v. Nelson Dodd Produce Company, 10 Cir., 207 F. 2d 296; Smith v. Welch, 10 Cir., 189 F. 2d 832;* and *Thiringer v. Barlow, 10 Cir., 205 F. 2d 476.*

We submit the lower courts were correct in their rulings on this matter.

2.

There is no conflict of decisions between the Court of Appeals and the Supreme Court of Oklahoma as to the substantive law of this case.

ARGUMENT

Petitioner cites only two Oklahoma cases dealing with "assured clear distance ahead," being *Vammen v. Kinsey, 181 Okl. 92, 72 P. 2d 497* and *Whitney v. Douglas, ___ Okl. ___, 307 P. 2d 154.* These cases concern the driver's inability to be able to stop within range of his headlights when the object collided with was in his lane of traffic.

This "range of headlights" rule is followed in several jurisdictions, but regardless of its merits it has no application to the facts of this case, as this collision happened in broad daylight, on a clear day, and petitioner was not in respondent Shelton's lane of traffic until immediately before the collision.

Petitioner cites no Oklahoma case which requires a legal definition of "assured clear distance ahead" and we find none. The trial court was correct in presenting the defense of "assured clear distance ahead" pleaded by petitioner but was certainly justified in adding:

> "However, you are further advised that in connection with Mr. Shelton's duty to drive so as to be able to stop within the assured clear distance ahead such does not mean that he had an absolute duty to drive in such a manner as to be able to stop and avoid any type of impact under any condition. Whether the plaintiff, Mr. Shelton, was driving so as to be able to stop within the assured clear distance ahead must be determined by you as a matter of fact from all the evidence; and, in this regard you are entitled to consider another applicable law which gives a driver, such as Mr. Shelton, the right to assume that others will use the highways lawfully, in determining his speed and ability to stop within the assured clear distance ahead."

By this latter language the trial court recognized a rule of law based on good sense and reason that a driver is not under an absolute duty to be able to stop and avoid any type of impact under any condition, and that Shelton had a right to assume Mrs. Franklin would use the highway

lawfully. The principle laid down in the charge has been previously recognized in the case of *Maragokis v. United States, 10 Cir., 172 F. 2d 393*, which held that the statutory duty to be able to stop in the distance the operator could see objects in the highway in front of him was not absolute. The court recognized that an area of discretion was allowed under conditions suddenly and unexpectly arising, when even with the exercise of due care, the driver could not avoid the collision.

There is an excellent discussion of this whole question in *Rogers v. Anchor Motor Freight, 95 Ohio App. 62, 117 N. E. 2d 451*, where many authorities are cited, but the majority holding is that there is no absolute liability under the statutory duty, and a jury issue is created when there appears some justification of not being able to stop even when in the exercise of due care. In the case at hand, this matter was submitted to the jury.

It does not appear that Petitioner has any other complaint against the charge with regard to the trial court not submitting her defenses. It seems that little complaint should be made on this issue since, as a matter of fact, respondents were entitled to a charge that a person turning left on a highway when not at an intersection is held to a "high" degree of care by the substantive law of Oklahoma. *See Highway Insurance Underwriters v. Nichols, 208 Okl. 242, 255 P. 2d 260.*

3.

The trial court's conduct of the case was fair in every way and petitioner was denied none of her constitutional rights (In reply to Petitioner's Questions Presented Numbers Three and Four).

ARGUMENT

At page 29 of her Petition for Writ of Certiorari, petitioner lists as causes for complaint (a) failure of the trial court to give proper instructions presenting her defenses and (b) the failure to instruct the jury what was meant by "assured clear distance ahead" and (c) the instruction that J. D. Shelton had the right to assume all persons would use the highway lawfully.

These contentions, we believe, have been adequately covered by our Argument under Propositions One and Two and will not be discussed further.

However, petitioner does advance the contention that the jury argument was not fairly conducted. The circumstances surrounding the jury argument show that both sides had thirty minutes to argue the case (R. 350). It was stated in open court that one of the plaintiffs' attorneys would open with a discussion of the liability features and the other would discuss the damages features. Since the plaintiffs had presented such a conclusive case of liability, in their opinion, then short shrift could be made of this subject, but there remained the task of putting before the jury the injuries of six people together with a discussion of the

voluminous medical evidence. The opening thus took only five minutes and the closing twenty-five minutes because of this situation. Petitioner's attorney did not object after all the arguments were in and did not ask for additional time to answer anything new in the plaintiffs' closing argument. We believe both the lower courts were quite correct in holding this matter to be within the discretion of the trial judge.

There is no Federal Rule of Civil Procedure governing jury argument in the trial court, and this has been a matter for the Federal District Judge's discretion since early times. We quote from *Florence Oil & Refining Co. v. Farrar, 8 Cir., 1901, 109 F. 254, 257:*

> "It is well settled in the courts of the United States that the determination of the right to open and close a case rests largely in the sound discretion of the trial court. Lancaster v. Collins, 115 U. S. 222, 6 Sup. Ct. 33, 29 L. Ed. 373; Hall v. Weare, 92 U. S. 728, 23 L. Ed. 500; Day v. Woodworth, 13 How. 363, 14 L. Ed. 181."

In *United States v. Grannis, 2 Cir., 1949, 172 F. 2d 207, certiorari denied, 337 U. S. 918, 69 S. Ct. 1160, 93 L. Ed. 1727*, the court held the Federal District Court is under no obligation to follow the procedural method of the state courts. Even in the extreme situation where defendant, who had the burden of proof on the whole case, waived opening argument and used his entire argument time after the plaintiff had closed, it has been held the matter of jury argument is entirely within the sound discretion of the trial

judge. See *Purington Paving Brick Co. v. Metropolitan, 8 Cir., 4 F. 2d 676.*

It appears from the cited cases and these facts that the lower courts have correctly decided the issue as to jury argument.

There remains one final contention on the part of petitioner in which she challenges the refusal of the trial court to grant a mistrial on account of the plaintiffs J. D. and Venera Shelton weeping during the trial. The fact that Venera Shelton wept is not in the record, this being merely the version of petitioner's attorney (R. 228, 229).

In any event, control of the trial is and should be in the hands of the trial court, absent the abuse of discretion. The overwhelming weight of American authority is to the effect that if a demonstration in court by the plaintiff or one of his witnesses is only of weeping, then this furnishes no basis for granting a new trial. We quote from *66 C. J. S. 127, Sec. 35*, which reads in part:

> "On the other hand, the fact that there was an emotional demonstration in court by the prevailing party or his relatives does not necessarily demand a new trial, and under the circumstances disclosed in particular cases it has been held no grounds for new trial that he or they became ill in the presence of the jury, cried, fainted, or relapsed into hysteria."

See also *39 American Jurisprudence 107; 57 A. L. R. 62*, and *Wiggins v. Sterne, Okl. 293 P. 2d 603, 606.*

Even though petitioner has raised the question of her constitutional rights for the first time in this Court, we

believe the record of this case is the strongest sort of evidence that none were violated, whether or not they were raised in the lower courts. The Constitution only guarantees petitioner a fair trial and not the results of the trial.

CONCLUSION

We submit there is no conflict of decision between the decision of the Court of Appeals in this case and any other case, it being a case where the petitioner submitted her case to a jury and lost. As to the merits, the respondents made out an almost conclusive case of liability and the amount of their damages have not been questioned in this Court.

It is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Brief has been mailed to opposing Counsel of Record with proper address and sufficient postage, this 3 day of February, 1968.

Howard S. Smith

HOWARD S. SMITH